

No. 77- 1671

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
October Term, 1977

MODJESKA SIGN STUDIOS, INC.,
Appellant,

v.

PETER A.A. BERLE,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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PETER A.A. BERLE,
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ON APPEAL FROM THE COURT OF APPEALS
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JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Court of Appeals of the State of New York sustaining the validity of a state statute against a challenge to its constitutionality as applied to the property involved in this case.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 43 N.Y.2d 468, 402 N.Y.S.2d 359 and 373 N.E.2d 255, and is set forth in Appendix A hereto (pp. 1a-13a). The opinion of the New York Supreme Court, Appellate Division, Third Department, is reported at 55 App. Div.2d 340 and 390 N.Y.S.2d 945, and is set forth in Appendix B

hereto (pp. 14a-21a). The opinion of the New York Supreme Court, Special Term, Albany County, is reported at 87 Misc.2d 600 and 386 N.Y.S.2d 765, and is set forth in Appendix C hereto (pp. 22a-30a).

JURISDICTION

Appellant Modjeska Sign Studios, Inc., instituted this action as a suit for declaratory and equitable relief in the courts of New York. The suit challenged a statute of the State of New York that prohibits the maintenance of off-premises outdoor advertising signs throughout the unincorporated portions of "Catskill Park," a 1055-square mile tract located in four counties in southeastern New York. Among the allegations was that on its face the statute, insofar as it prohibited the maintenance of Modjeska's billboards in the Park, abridged freedom of speech in violation of the First Amendment and deprived Modjeska of property without due process of law in violation of the Fourteenth Amendment. (R.24-31.)¹ By an order of August 4, 1976, summary judgment was granted at Special Term sustaining the validity of the statute as against those claims. The Appellate Division and the Court of Appeals affirmed the order of the Special Term, in pertinent part.

The Court of Appeals' judgment was entered on December 21, 1977, and is set forth in Appendix D hereto (pp. 31a-32a). An order of the Court of Appeals denying Modjeska's motion for reargument and for an amendment of the remittitur was entered on February 22, 1978, and is set forth in Appendix E hereto (p. 33a). Notices of appeal were filed in the Court of Appeals and at Special Term on March 30 and May 11, 1978, respectively, and are set forth in Appendix F hereto (pp. 34a-35a).

¹References to the Appendix below are cited "R. ____."

Jurisdiction to hear this appeal is conferred on this Court by 28 U.S.C. § 1257(2).² The following cases sustain the jurisdiction of this Court: *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Spence v. Washington*, 418 U.S. 405 (1974) (*per curiam*); *Panhandle Eastern Pipe Line Co. v. Highway Comm'n*, 294 U.S. 613 (1935).

STATUTE INVOLVED

Section 9-0305 of the Environmental Conservation Law of the State of New York sets forth restrictions on the erection and maintenance of outdoor advertising signs within the region designated as Catskill Park. The provisions of the statute challenged on this appeal are set forth in subsection 1 of the statute, which provides, in relevant part, as follows:

"1. . . . [N]o person shall erect or maintain within the boundaries [of the park] . . . any advertising sign, advertising structure or device of any kind, except under written permit from the [D]epartment [of Environmental Conservation]. . . ."³

"As to signs, structures or devices existing within the Catskill park on May 26, 1969, and

²Although the Court of Appeals remanded for a hearing of the issue of the "reasonableness" of the statutory grace period preceding the uncompensated removal of the signs, there is no question as to the finality of the judgment. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480, 482-83 (1975).

³Excepted from the statute's prohibition are accessory or on-premises signs, *i.e.*, signs "erected or maintained upon a parcel of real property in connection with the principal business or principal businesses conducted thereon and which advertise such business or businesses only," and also "signs within the limits of an incorporated village," of which there are three. On-premises signs would include signs in the parking lot adjoining a liquor store or a franchised fast-food carryout and signs on or projecting from the wall of a building housing a hardware store or laundromat.

which require a permit pursuant to this section, the same may continue to be maintained without permit until January 1, 1976 provided that the property owner or owner of such sign, structure or device registers the same with the department on or before January 1, 1972."

The complete text of the statute is set forth in Appendix G hereto (pp. 36a-40a).

QUESTIONS PRESENTED

1. Whether a state statute that expels from a 1055-square mile region an entire medium of mass communication, where the sole justification for the expulsion is a perception that the medium offends undefined "aesthetic" values, constitutes an impermissible abridgment of freedom of speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment.

2. Whether a state statute that effects a total destruction of a decades-old legitimate business by requiring that business to remove its property from the entire region, without compensation, where concededly the continuance of that business will not adversely affect the health, safety or tangible welfare of other persons or their property, deprives the proprietor of property without due process of law in violation of the Fourteenth Amendment.

STATEMENT

The subject of this case is a statute of the State of New York that requires the removal from Catskill Park of 96 off-premises outdoor advertising signs maintained by appellant Modjeska Sign Studios, Inc. These signs have been maintained in and around various of the zoned and unzoned towns situated within the Park in areas that are occupied also by other commercial establishments. (R.24-31.)

Modjeska has been engaged in the business of erecting and maintaining such signs — commonly known as billboards — since 1926. Modjeska's signs have been part of the Catskill Park landscape since the 1930's. All of the locations on which Modjeska's Catskill Park signs now rest were first occupied before 1969. (R. 25.)

"Catskill Park," as an area distinct from the Catskill region of which it is the centerpiece, is a creation of the New York Legislature.⁴ It is a tract of 675,000 acres, 241,000 of which are forest preserve,⁵ carved principally from the northern half of Ulster County and the southern half of Greene County, with small portions also taken from the northern and eastern tips of Sullivan and Delaware Counties, respectively.⁶ The Catskill region, as designated by historians and current state-commissioned planners, has a population of more than 375,000.⁷

Long before Modjeska and other legitimate businesses settled in what became "Catskill Park," that tract and its environs were the site of some of America's earliest commercial activity: In 1609, Hudson explored the region, in 1610 a fort was constructed at Atkarkarton, and in 1614 the Dutch West India Company established a trading post

⁴N.Y. Env'tl Conserv. Law § 9-0101(2) (McKinney 1973). The Park was established in 1904. 1904 N.Y. Laws, c. 233. In 1957, its boundary — known as the "Blue Line" (see The Catskill Center Plan 41-42 (1974)) — was extended by 107,660 acres south and east to the western side of the New York Thruway, including a small corner of the City of Kingston. 1957 N.Y. Laws, c. 787; see accompanying Message of the Governor, 1957 N.Y. Laws at 1911, and Catskill Region Map (N.Y. Temporary State Comm'n to Study the Catskills, 1975). The Park boundary shown in the most commonly referred to source, the Rand McNally Road Atlas 71 (1977), is the pre-1957 boundary.

⁵The Future of the Catskills 4 (N.Y. Temporary State Comm'n to Study the Catskills, 1975) ("Catskill Study"). Substantial portions of the forest preserve were acquired by tax foreclosure and eminent domain proceedings. *Id.* at 46; The Catskill Center Plan, *supra*, at 46.

⁶N.Y. Env'tl Conserv. Law § 9-0101(2), *supra*.

⁷Catskill Study, *supra*, at 4.

several miles east of the present southern entrance to the Park. By 1661, Dutch and Huguenot immigrants had established the settlement that now is the town of Hurley.⁸ The industrial and general economic history of the region has been one of "ebb and flow," with its first major industry, leather tanning, going out of business by 1885,⁹ and the bulk of recent area development centered slightly below the region in the southern portions of Ulster County.¹⁰

The region has shared in the financial misfortunes of New York State and City. Recently, it was characterized by its state-commissioned planners as afflicted with "a sagging economy," in which "tourism, resorts and recreational activity are economic mainstays," although the "attitudes of permanent residents of the area are not altogether favorable" to such an economic base.¹¹ Thus, as reflected in the most comprehensive public source, the yellow pages of the telephone directory for Kingston and surrounding communities, in the Ulster County portion of the Park alone there are nine resorts, 36 hotels and motels, and a full complement of retail sales and service establishments. In addition, a variety of small and medium-sized industries are located throughout northern Ulster County and Greene County, including many in the Park itself, *e.g.*, saw mills, plants that manufacture cooling and power conversion equipment, concrete, dresses, munitions and fabricated steel products.¹² The normal or predominant use of the Park's major east-west arterials, all

⁸Ulster County Planning Board Data Book 7 (1973) ("Ulster Report").

⁹Catskill Study, *supra*, at 4.

¹⁰Ulster Report, *supra*, at 43.

¹¹Catskill Study, *supra*, at 8-9.

¹²Ulster Report, *supra*, at 9, 43-51; Economic Data on Greene County at VI-10 (Greene County Indus. Dev. Agency, 1975); Profile of Business and Industry, Mid-Hudson Area, Part 1, at 7, 23 (N.Y. Dep't of Commerce, 1976).

federally-aided primary highways (Routes 28, 23 and 23A),¹³ is by residents of the region seeking to transact business at the roadside retail and wholesale establishments in the Park and by persons journeying to and from the Park's resorts and other traveler accommodations. Sections of the Park's principal road, Route 28, are seen by residents as burdened with "very heavy" traffic, "causing noise and air pollution"¹⁴; other sections have been characterized by the State as "blighted" with "commercial activity," including a "commercial strip," and a shopping center under construction.¹⁵ A principal criticism of those studying the land use planning of the region's 160 cities, towns and villages was that, as of the fall of 1973, the "subdivision and zoning ordinance situation" was "dismal."¹⁶

Modjeska is the largest sign operator in the Park.¹⁷ Each of its signs is located on or adjacent to a major commercial thoroughfare linking one or more of the area communities. Sixty-six of its signs are on Route 28, the major east-west arterial bisecting the Park, spanning its width and connecting Kingston with Utica and other New York cities to the north and west.¹⁸

The spaces on Modjeska's signboards are purchased by small local commercial establishments, agencies of the United States government, candidates for public office, and

¹³R. 27; Catskill Region Map, *supra*.

¹⁴Ulster County Env'tl Management Council Annual Report 23 (1975).

¹⁵Catskill Study Report No. 7, Towards a Scenic Roads Program for the Catskills 24-25 (N.Y. Dep't Env'tl Conserv., 1976).

¹⁶Catskill Study, *supra*, at 6; *see also* Catskill Study Report No. 7, *supra*, at 19-27.

¹⁷As of September 1976, approximately 216 signs in the Park were deemed by the State to be "illegal" under § 9-0305. Catskill Study Report No. 7, *supra*, at 15.

¹⁸R. 32-41; Catskill Region Map, *supra*; Rand McNally Road Atlas, *supra*, at 71.

citizens groups seeking to present their positions on controversial issues of public importance.¹⁹ During any given year, Modjeska makes available at least 3 to 5 percent of its signs for the presentation of public service advertising on behalf of local charities and other causes. As with the other mass media, the value of outdoor advertising is measured by its circulation, which is defined by the industry as the number of persons passing a sign each day. Because of the heavy flow of daily traffic along Route 28 and the other thoroughfares served by its Park signs, the average daily circulation of Modjeska's Park signs exceeds 20,000.

All of Modjeska's signs have been operated lawfully on property owned by it or leased from Catskill land owners; when the litigation began, the estimated fair market value of Modjeska's Catskill Park plant was \$600,000. (R.24.) On May 26, 1969, New York enacted amended section 3-0327 of the Conservation Law.²⁰ The pertinent portions of that statute, as further amended in 1970,²¹ survived the 1972 recodification²² of the State's conservation laws and are set forth in section 9-0305 of the Environmental Conservation Law. In relevant part, the latter statute prohibited the erection or maintenance of outdoor advertising signs in the unincorporated portions of Catskill Park unless, for a particular sign, a permit was issued by the Department of Environmental Conservation. It also provided that all signs standing within the Park before May 26, 1969, might continue to be maintained without a permit until January 1, 1976. The State conceded that Modjeska's signs were not eligible for permits under rules promulgated by the Depart-

¹⁹When the present litigation began, four of Modjeska's signs were United States Army recruitment posters. Each of the remaining 92 signs advertised the goods or services of a local business, *i.e.*, a business located within 10 miles of the sign. (R.32-41.)

²⁰1969 N.Y. Laws, c. 1052, §1.

²¹1970 N.Y. Laws, c. 392, §§ 1-3.

²²1972 N.Y. Laws, c. 664, § 5.

ment of Environmental Conservation and thus were subject to removal on January 1, 1976. (R.44.)

On December 17, 1975, Modjeska filed the present action in the New York Supreme Court, Special Term, Albany County. (R.20-31.) Its verified complaint included allegations that the statute was unconstitutional on its face, in that it abridged the free speech rights of Modjeska and of those with whom it sought to communicate in violation of the First Amendment (R.27) and deprived Modjeska of its property without due process of law in violation of the Fourteenth Amendment. (R.26.) The state moved to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. (R.42-48.)

The Special Term granted the State's motion as one for "summary judgment, declaring the subject statute to be valid." (App. C, p. 30a.) The Appellate Division affirmed. The Court of Appeals reversed in part (*see note 2, supra*), but upheld the constitutionality of the statute, rejecting Modjeska's First and Fourteenth Amendment contentions. (App. A, pp. 1a-13a.) It did not discuss the First Amendment issue at all, relying on its discussion in *Suffolk Outdoor Adv. Co. v. Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263, decided at the same time. The opinion in the *Suffolk* case appeared first to accept the basic "commercial speech" holding of the only one of this Court's decision cited by it, *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976), but held billboards beyond the coverage of that case because "the court recognized that a State may regulate the time, place or manner of commercial speech . . . to effectuate a significant governmental interest" and that the "regulation of aesthetics constitutes such an interest." 43 N.Y.2d at 489, 373 N.E.2d at 265.

On the Fourteenth Amendment question, the Court of Appeals proceeded on the assumption that the statute was

enacted solely to promote aesthetic interests. It expressly reaffirmed (App. A, pp. 2a, 7a) its decision the same day in the *Suffolk* case in which it had held forthrightly that "aesthetics constitutes a valid basis for the exercise of the police power and that the . . . ordinance [in question] prohibiting nonaccessory billboards is substantially related to the effectuation of this objective." (43 N.Y.2d at 490, 373 N.E.2d at 266.) In *Modjeska*, the court said that to be "reasonable," an exercise of the police may "not unreasonably deprive an owner of all beneficial use of his property." (App. A, p. 3a.) It reversed the Appellate Division's judgment and remanded for a trial of the issue of the "reasonableness" of the period between the enactment of the statute and the time of the required removal of the billboards. (App. A, p. 12a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

- I. A STATE STATUTE THAT EXPELS FROM A 1055-SQUARE MILE REGION AN ENTIRE MEDIUM OF MASS COMMUNICATION, WHERE THE SOLE JUSTIFICATION FOR THE EXPULSION IS A PERCEPTION THAT THE MEDIUM OFFENDS UNDEFINED "AESTHETIC" VALUES, CONSTITUTES AN IMPERMISSIBLE ABRIDGMENT OF FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AMENDMENT

The court below rejected Modjeska's First Amendment contention without discussing it. It did so in sole reliance on its discussion in *Suffolk Outdoor Adv. Co. v. Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263 (1977), decided the same day. Suffolk Outdoor Advertising Company, through the undersigned counsel, has this day perfected its appeal in that case and has argued in its jurisdictional statement that the decision of the Court of Appeals in *Suffolk* raises a substantial federal question about the status of outdoor ad-

vertising under the First Amendment. The First Amendment question raised by the compelled elimination of Modjeska's signs from Catskill Park is substantial for the same reasons as the question raised by the compelled elimination of Suffolk's signs from the Town of Southampton. Accordingly, we adopt the First Amendment argument presented in Suffolk's jurisdictional statement, copies of which are being served upon counsel for the appellee in this case.

In its *Suffolk* opinion, the Court of Appeals said that the billboards there involved constitute "commercial speech," the "time, place or manner" of which could be "regulated" — to the extent of prohibition — to effectuate a "significant governmental interest in aesthetics." This Court said in *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), that it had often approved time, place or manner restrictions "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." In the *Suffolk* jurisdictional statement, it is shown that this Court's standards are not satisfied by a town-wide prohibition of billboards. Nor are they satisfied by the prohibition at issue here. To what is said in the *Suffolk* statement about the lack of "ample alternative channels" and of "a significant governmental interest," we add these few words.

Alternative Channels. Neither of the appellate courts below mentioned the admitted allegations of Modjeska's verified complaint, and of the verified complaint of the proposed intervenor, the Outdoor Advertising Association of New York, concerning the unique qualities of Modjeska's Catskill Park signs as efficient and inexpensive vehicles for conveying information, "whether commercial, political or social." (R.25, 67.) The Appellate Division said

in its opinion in this case that "the same information can be conveyed to the public by newspaper, radio or television advertising." (App. B, p. 20a.) The implication that there are ample alternatives to Modjeska's signs is false.

Few of Modjeska's signs are ever utilized by the large regional or national commercial advertiser. Rather, Modjeska offers a distinctly local advertising medium. At the time it filed suit, 92 of its 96 Catskill Park signs advertised the goods or services of a business located within 10 miles of the sign; the other four signs were occupied by United States Army recruitment posters. And, during election periods, it is the candidate for local — Ulster or Greene County — political office who purchases space on Modjeska's signs. Contrary to the Appellate Division's off-hand assumption, none of the other mass media offers a commercially acceptable alternative. A candidate for local office in any of the Greene or Ulster County communities within the Park, or a similarly-situated restaurant (R.33, 35, 37, 39), car wash (R.35) or plumber (R.35), does not have available a local VHF television station on which to purchase a 30-second spot; the choices are limited to three Albany, one Hartford, and six New York City television stations, whose normal rates range from \$300 to \$6,000 for that half minute.²³

Significant Governmental Interest. The interest asserted here, as in *Suffolk*, is an interest in what the Court of Appeals termed "aesthetics." Such an interest cannot suffice

²³47 Television Factbook, Stations Volume 149-b, 558-b-561-b, 571-b-575-b (1978). Persons driving along Routes 28 or 23A do not stop to buy a newspaper to find a suitable local restaurant, diner, or auto repair shop. If they did, however, the choices would be limited to the Catskill Mail, a Greene County afternoon newspaper published Monday through Saturday with a circulation of 4873, and the Kingston Freeman, an afternoon newspaper published Sunday through Friday, with a peak (Sunday) circulation of 23,562. Profile of Business and Industry, Mid-Hudson Area, Part 1, at 22 (N.Y. Dep't of Commerce, 1976).

as a reason for suppressing a medium of speech, at least until there is an inquiry into "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time," *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). When such an inquiry is made, there is obviously no such "aesthetic" interest relating to Catskill Park as can justify this prohibition of billboards. The "normal activity" to which the roads of the commercial and industrial districts of the Park have been committed for centuries remains thoroughly compatible with the signs, including Modjeska's, that communicate to the consuming public the particulars of that activity. The major industries within the Park — the sawmills, the manufacturers of munitions, concrete and heavy industrial equipment — do not depend for their sales on mass media advertising to local and touring motorists. But such advertising, as the least expensive and most effective means of mass communication, is the life blood of local merchants in this economically-depressed region, including those who make their living from hotel or motel proprietorship and other activity connected with the tourist industry.²⁴

²⁴In 1976, a New York legislative body estimated that "about one-third of traveler- or highway-oriented business can be attributed to highway advertising signs," and that this indicated that "more than \$1.2 billion of the income of the State's second largest industry may be attributable to highway signs." Vital Signs: Sustaining the Health of Tourism 8 (N.Y. State Senate Task Force on Critical Problems, 1976).

II. A STATE STATUTE THAT EFFECTS A TOTAL DESTRUCTION OF A DECADES-OLD BUSINESS BY REQUIRING THAT BUSINESS TO REMOVE ITSELF FROM A 1055-SQUARE MILE REGION, WITHOUT COMPENSATION, WHERE CONCEDEDLY THE CONTINUANCE OF THAT BUSINESS WILL NOT ADVERSELY AFFECT THE HEALTH, SAFETY OR TANGIBLE WELFARE OF OTHER PERSONS OR PROPERTY, DEPRIVES THE PROPRIETOR OF THE BUSINESS OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT

The court below rejected Modjeska's Fourteenth Amendment claims that the State of New York could not, simply by invoking its police power and without resort to its power of eminent domain, force the removal of Modjeska's signs. Once again, the Court of Appeals ruled in express reliance on the constitutional analysis offered in *Suffolk* that deferred destruction of Modjeska's \$600,000 Catskill Park business did not "rise to the level of a 'taking'" (App. A, p. 4a) and that the grace period preceding the destruction, while not the equivalent, was a permissible substitute for the "just compensation" that the Constitution requires. To the court below, the only noticeable difference between the cases was the length of the grace periods and the nominal opportunity under the Southampton ordinance at issue in the *Suffolk* case for Suffolk Outdoor to obtain a brief extension of that grace period. (App. A, pp. 7a-12a.)

Suffolk Outdoor has set forth in its jurisdictional statement the reasons why the decision of the Court of Appeals in *Suffolk* raises a substantial federal question as to the power of the state under the Fourteenth Amendment to effect a municipality-wide prohibition of a decades-old legitimate business without paying "just compensation" to the proprietor of the business. The Fourteenth Amendment question raised by the uncompensated destruction of Modjeska's Catskill Park business is substantial for the same

reasons. Accordingly, we adopt the Fourteenth Amendment argument presented in Suffolk Outdoor's jurisdictional statement and offer only a few additional comments.

Certainly there are parts of the vast Catskill region that should be preserved in their natural state, such as the 241,000-acre forest preserve portion of the Park, acquired principally through condemnation and tax foreclosure proceedings.²⁵ And, perhaps, certain of the areas of the Park, long ignored and burdened with "very heavy" traffic, "noise and air pollution," or commercial "blight"²⁶ should be reclaimed and restored to a prior condition through the use of the same eminent domain powers that the State has invoked since the 19th Century to acquire for itself portions of the region.

The Catskill Park billboard statute does not seek to "protect the works of nature or the achievements of art or the associations of history"²⁷ or to preserve or protect any feature of the commercial and industrial areas of the Park as they have grown since Modjeska's signs first joined them in the 1930's.²⁸ Rather, it seeks to oust a member of the region's economic community merely to achieve "an

²⁵ See discussion *supra*, at 5 n.5.

²⁶ See discussion *supra*, at 7.

²⁷ *Mayor and City Council of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 92, 299 A.2d 828, 835 (1973).

²⁸ But for accidents of history, the portion of the Park added by the 1957 extension, in which 34 of Modjeska's signs are located, would be just another neighborhood or suburb of an upstate New York city. See discussion *supra*, at 5 and n.4; R.32-41. The citizens' conservation group that authored *The Catskill Center Plan*, *supra*, recommended the "reconsideration" of the 1957 extension. It was of the opinion that "for management purposes a more practical and logical boundary could be drawn eliminating this eastward extension of the Park, with the idea of rededicating the scattered and isolated parcels in the vicinity of Stony Hollow for a variety of more intensive recreational uses." *The Catskill Center Plan*, *supra*, at 42.

aesthetically pleasing result."²⁹ If the State can use the police power in this manner, then it can so employ it in any region and bring about the state-wide death of the oldest, least expensive and most accessible of the media of mass communication.³⁰ The desires of New York's political leaders to enhance the region's "aesthetic" are legitimate, if elusive, goals. But the statute is not reasonably calculated to further them, except in a way that unfairly and unreasonably impairs Modjeska's property interests, and therefore cannot withstand scrutiny under the Fourteenth Amendment.

²⁹Mayor and City Council of Baltimore v. Mano Swartz, Inc., *supra*, 268 Md. at 92, 299 A.2d at 835.

³⁰Member companies of the Outdoor Advertising Association of New York own and operate a total of 9358 billboards in 60 of the State's 62 counties. (R.59.) According to recent estimates, their operations produce gross annual revenues of approximately \$7,250,000. (R. 59-60.) On the national level, in 1977 outdoor advertising revenues totalled \$461,757,084, *see* Outdoor Advertising Expenditures, inside cover page (Leading National Advertisers, Inc., 1978); prior five-year comparisons had shown that outdoor advertising industry revenues rose 41.4% between 1970 and 1975, with 8.3% of that growth between 1974 and 1975. Ayer Media Facts 2 (1976-77). As for the sheer number of industry signs, a 1975 publication stated the presence of 270,000 standardized structures in 9000 communities across the United States. The First Medium 10 (Institute of Outdoor Advertising, 1975).

CONCLUSION

Probable jurisdiction should be noted and the case set down for plenary consideration on its merits.

Respectfully submitted,

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May 1978

APPENDIX A
STATE OF NEW YORK
COURT OF APPEALS

Modjeska Sign Studios, Inc.,
Appellant,

vs.

Peter A. A. Berle, Individually,
and as Commissioner of the De-
partment of Environmental
Conservation, &c.,
Respondent,

Charles A. Dale, Jr., as
President &c., Outdoor
Advertising Association of
New York, &c.,
Proposed Intervenor-Appellant.

JASEN, J.:

At issue on this appeal is whether the State, having enacted legislation regulating advertising signs and structures in the Catskill and Adirondack Parks, may, after the expiration of a 6-1/2 year amortization period, require the removal of nonconforming signs without compensation.

Section 9-0305 (subd [1]) of the Environmental Conservation Law provides that to ensure the natural beauty of the Catskill and Adirondack Parks, advertising signs and structures, for which a permit is not obtained, are prohibited except accessory signs and signs located within the limits of an incorporated village. Any signs erected within the Parks as of May 26, 1969, which are not in conformance with the regulations promulgated to implement section 9-0305 (see 6 NYCRR 195), were required to be removed by January 1, 1976. (§ 9-0305, subd [1]).

Plaintiff owns approximately 96 outdoor advertising signs or billboards situated within the Catskill Park. Admittedly, none of these signs conforms to the regulations promulgated pursuant to section 9-0305. Seeking therefore to enjoin the removal of its signs, plaintiff, only two weeks before the expiration of the amortization period, commenced the present action to declare section 9-0305 unconstitutional on the ground that it constitutes a taking for which compensation must be provided.

Special Term denied plaintiff's motion for a preliminary injunction and granted summary judgment for the defendant, declaring section 9-0305 of the Environmental Conservation Law to be constitutional. The Appellate Division unanimously affirmed.

Having reaffirmed today our prior decisions holding aesthetics to be a valid basis for the exercise of the police power (see *Suffolk Outdoor Adv. Co. v. Hulse*, _____ NY2d _____ [decided herewith]), we proceed to a consideration of plaintiff's contention that section 9-0305 of the Environmental Conservation Law constitutes a taking requiring that monetary compensation be given to owners of nonconforming signs removed from the Catskill Park.

The power which the State may exercise over private property spans a wide spectrum. The State may choose merely to regulate the use of land pursuant to the police power or to "take" or physically acquire property pursuant to the power of eminent domain. (*French Inv. Co. v. City of New York*, 39 NY2d 587, 593, app dsmd 429 US 990; see generally, Sax, *Takings and the Police Power*, 74 Yale L J 36.) The mode of control chosen to effectuate the desired governmental end has all too often been termed critical to a determination of the necessity of providing compensation to property owners adversely effected. Unfortunately, characterization of the State's exercise of control over private property as either a noncompensable regulation or a

compensable taking is often fraught with difficulty. As Professor Costonis has aptly commented: "Like the bedeviled horseman, government stands shakily astride the police and eminent domain powers as it seeks to give direction in land use affairs." (Costonis, "Fair" Compensation and the Accommodation Power: Antidotes For the Taking Impasse in Land Controversies, 75 Colum L Rev 1021.)

Perhaps the difficulty in precisely delineating the boundary between the police and eminent domain powers stems from the realization that, as a practical matter, any restriction upon the use of property is a deprivation and has a substantially adverse impact upon market value and, in that sense, has been loosely described as a "taking". (See *Salamar Bldrs. Corp. v Tuttle*, 29 NY2d 221, 225.) On the other hand, it is equally true "[t]hat hardship is inevitably the product of police regulation and the pecuniary rights of the individual, of necessity, must be subordinate to those of the common weal." (*Salamar Bldrs. Corp. v Tuttle*, 29 NY2d at p 225, *supra*.) In the final analysis, characterization of government control over private property turns usually on a difference of degree and only occasionally on a difference in kind.

In exercising the police power to provide for the general welfare of the people, the State may reasonably regulate the use of private property, notwithstanding the curtailment of private property rights. (*People ex rel. Durham R. Corp. v LaFetra*, 230 NY 429, 442; *New York State Thruway Auth. v Ashley Motor Ct.*, 10 NY2d 151, 157.) The requirement that an exercise of the police power be reasonable mandates not only that the regulation relate to the purpose for which it was enacted, but also that it does not unreasonably deprive an owner of all beneficial use of his property. (*Salamar Bldrs. Corp. v Tuttle*, 29 NY2d at p 225, *supra*.) An exercise of the police power unreasonably frustrates an owner's use of his property "if it renders the property unsuitable for any reasonable income productive or other private use for

which it is adapted and thus destroys its economic value, or all but a bare residue of its value (see, e.g., *Lutheran Church in Amer. v City of New York*, 35 NY2d 121, 130, *supra*; *Vernon Park Realty v City of Mount Vernon*, 307 NY 493, 499, *supra*; *Shepard v Village of Skaneateles*, 300 NY 115, 118; *Arverne Bay Constr. Co. v Thatcher*, 278 NY 222, 226, 232, *supra*; *Matter of Eaton v Sweeny*, 257 NY 176, 183; 1 Rathkopf, *op cit.*, § 6.02, at p 6-2)." (*French Inv. Co. v City of New York*, 39 NY2d at p 596, *supra*.) To so frustrate an owner's use of his property under the guise of the police power is, in reality, nothing more than a deprivation of property without due process of law. (N Y Const, Art I, § 6; U. S. Const, 14th Amdt, § 1, *French Inv. Co. v City of New York*, 39 NY2d at p 595, *supra*; *Vernon Park Realty v City of Mount Vernon*, 307 NY 493, 499, 1 Rathkopf, *Law of Zoning and Planning* [4th ed], § 4.02.)

Turning to an analysis of the statute involved in the present case, we believe it helpful to view, at the outset, the effect of this statute from the perspective of an owner of land upon which a billboard has been erected. Formulated in this setting, the critical inquiry becomes whether section 9-0305 of the Environmental Conservation Law renders an owner's property unsuitable for any use for which it is adapted, thereby destroying its economic value.

Viewed from this perspective, the restrictions placed upon the use of property by section 9-0305 of the Environmental Conservation Law do not rise to the level of a "taking" or confiscation without due process of law. In reaching this conclusion, we borrow from the analysis employed in two recent cases, *French Inv. Co. v. City of New York* (*supra*) and *Penn Central v. City of New York* (42 NY2d 324).

In *French*, which involved an amendment to the New York City Zoning Resolution purporting to create a Special Park District, we were confronted, as we are again

today, with a challenge to regulation of the use of private property. The amendment to the New York City Zoning Resolution rezoned two private parks in the Tudor City residential complex in Manhattan as public parks. By rezoning the property exclusively as public parks, the City precluded any residential or office building development. Finding that the zoning amendment prohibited "all reasonable income productive or other private use of the property", we held the amendment violative of due process. (39 NY2d at pp 590-591, *supra*.)

Although the zoning amendment in *French* did permit the transfer of development rights from the parks to other areas in Manhattan, they did not attach to specific parcels. Thus, we characterized these rights as "floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to contingent approvals of administrative agencies." (39 NY2d at pp 597-598, *supra*.) Because of the uncertainty of future realization of these rights, we rejected the contention that the amendment did not deprive the property owner of all rights in his property.

Analogous to *French* is our more recent decision in *Penn Central v City of New York* (42 NY2d 324), involving a provision of the Administrative Code of the City of New York, which, as applied to Grand Central Terminal, prohibited the erection of an office tower over the existing structure. Characterizing landmark regulation as unlike either zoning or eminent domain, we held that such regulation does not violate due process as long as the landowner is allowed a reasonable return on his property. (42 NY2d at pp 330-331, *supra*.)

In contrast to the zoning amendment at issue in *French*, the landmark regulation in *Penn Central* did not deprive the property owner of the ability to use the regulated land

in a manner which would ensure a reasonable return on its investment. Also unlike the amendment in *French*, the regulation in *Penn Central* provided for the transfer of development rights to other parcels in the area, a number of which were already owned by Penn Central. Consequently, the uncertainty of future economic realization which plagued the *French* amendment was absent in *Penn Central*.

Although the regulation of billboards presents a somewhat different problem than those previously encountered in *French* and *Penn Central*, the analytical framework developed in those cases is useful in resolving whether a landowner who has erected billboards on his property is deprived of the use of his property by a regulation prohibiting the maintenance of such billboards. Drawing upon this analysis, we are of the opinion that, regardless of whether a legislative pronouncement is denominated a zoning ordinance, a landmark regulation, or more broadly, as an exercise of the police power, the critical test of its constitutionality remains whether the challenged legislation deprives a property owner of all reasonable use of his property. To be distinguished, however, are instances of the exercise of the governmental power of eminent domain in which there is a true "taking" of the property.

Applying this test in the present case, we conclude that the regulation of billboards does not deprive a property owner of all reasonable use of his property. Section 9-0305 of the Environmental Conservation Law does not, as did the zoning amendment in *French*, place upon the property owner an affirmative requirement—a burden that the land be utilized exclusively as a park open to the public. Instead, this regulation merely places upon the landowner, and therefore upon his lessee, a particular negative restriction—that billboards alone may not be maintained upon specified property. On this analysis, it cannot be said that

the prohibition of billboards deprives landowners or their lessees of all reasonable use of their property.

Thus, the logical corollary to this conclusion is that lessees of property upon which the maintenance of billboards has been prohibited have not been unreasonably deprived of property in violation of due process of law. Certainly a lessee cannot be said to possess a property interest greater than that of the fee owner. By merely entering into a lease specifically for the purpose of erecting a billboard, a lessee is not immunized from regulation of billboards under the police power. A lessee stands in no better position than that of the property owner. If the property owner is not deprived of all reasonable use of his property by an exercise of the police power, then neither may the lessee claim that he was. For this reason, we cannot agree with plaintiff's contention that section 9-0305 of the Environmental Conservation Law unreasonably deprives it of property without due process of law.

Although we do not believe that plaintiff is entitled to monetary compensation for the removal of nonconforming billboards, we are of the opinion that a regulation requiring the immediate removal of billboards without compensation in some instances might be an unconstitutional deprivation of property. In reaching this conclusion, we are not unmindful of our previous decisions in which we have held that outdoor signs and billboards located along the New York State Thruway may be prohibited and removed without compensation. (See *New York State Thruway Auth. v Ashley Motor Ct.*, 10 NY2d 151, *supra*; *Whitmier & Ferris Co. v State of New York*, 20 NY2d 413.) These decisions were premised, however, upon concern for the safety of motorists traveling along the Thruway.

While it is true that aesthetics, in itself, constitutes a valid basis for the exercise of the police power just as safety does (*Suffolk Outdoor Adv. Co. v Hulse*, ___ NY2d ___ [decided herewith]; *Matter of Cromwell v Ferrier*, 19 NY2d

263; *People v Goodman*, 31 NY2d 262; *Rochester Poster Adv. Co. v Town of Brighton*, 49 AD2d 272; 1 Anderson, *New York Zoning Law and Practice* [2d ed], §§ 7.97, 11.54; 6 N Y Jur, *Zoning and Planning Laws*, § 123), the public benefit gained from the immediate implementation of a regulation enacted pursuant to the police power to effectuate these objectives may not necessarily be of equal significance. Certainly, a billboard which serves as a menace to the safety of motorists should be removed without delay. In such a case, the public benefit gained by immediate implementation of an exercise of the police power far outweighs the concomitant financial injury suffered by the affected billboard and property owners.

In contrast to a safety motivated exercise of the police power, a regulation enacted to enhance the aesthetics of a community generally does not provide a compelling reason for immediate implementation with respect to existing structures or uses. True, the public will benefit from a more aesthetically beautiful community, but absent the urgency present in a safety-motivated regulation, the immediate benefit gained does not outweigh the loss suffered by those individuals adversely affected. As always, an exercise of the police power must be reasonable. (*French Inv. Co. v City of New York*, 39 NY2d at p 595, *supra*; *Salamar Bldrs. Corp. v Tuttle*, 29 NY2d at p 225, *supra*; 1 Rathkopf, *Law of Zoning and Planning* [4th ed], §4.02, *supra*.) While we do not believe that compensation is required, we do believe that it would have been unreasonable to require, solely for aesthetic purposes, the immediate removal of the billboards prohibited in the present case.

Fortunately, rather than adopting a regulation requiring the immediate removal of nonconforming billboards without compensation, the Legislature has chosen to provide an amortization period as a means of ameliorating the burden cast upon affected billboard owners. The concept of amortization evolved as a hoped for solution to the

tension between the ideal of comprehensive zoning and contemporary notions of due process. At the outset, even zoning laws prospective in operation only were looked at with a jaundiced eye. Understandably, attempts to apply a zoning ordinance retroactively faced far greater resistance. (See Comment, *The Abatement of Pre-existing Nonconforming Uses under Zoning Laws: Amortization*, 57 NW L Rev 323.) Consequently, zoning ordinances were enacted to control only new land uses. As for existing nonconforming uses, it was hoped that they would gradually disappear. However, as Professor Anderson has observed: "It became axiomatic that old uses never die." (Anderson, *Amortization of Nonconforming Uses—A Preliminary Appraisal of Harbison v City of Buffalo*, 10 Syr. L Rev 44; see Comment, *The Abatement of Pre-existing Nonconforming Uses Under Zoning Laws: Amortization*, *supra*.)

As a middle ground between prospectively and retroactively applied zoning laws, the concept of amortization emerged. By limiting the period during which an existing nonconforming use may be continued, a balance is struck between an individual's interest in maintaining the present use of his property and the general welfare of the community sought to be advanced by the zoning ordinance. Thus, by permitting a limited period during which an existing nonconforming use may be continued, rather than requiring its termination immediately, amortization provides an owner with an opportunity to recoup his investment and avoid substantial financial loss. (See generally, ALI Model Land Development Code, Art 4, Discontinuance of Existing Land Uses, 142, 146 [1975]; 2 Anderson, *New York Zoning Law and Practice* [2d ed], §6.47; Ann., *Nonconforming Uses—Amortization*, 22 ALR 3d 1134; Anderson, *Amortization of Nonconforming Uses—A Preliminary Appraisal of Harbison v City of Buffalo*, *supra*; Holme, *Billboards and On-Premises Signs: Regulation and Elimination Under the Fifth Amendment*,

1974 Inst. on Planning, Zoning, and Eminent Domain 247; Comment, *The Abatement of Pre-existing Nonconforming Uses Under Zoning Laws: Amortization*, *supra*.).

In *Matter of Harbison v City of Buffalo* (4NY 2d 553), involving an ordinance requiring the termination of a cooperage business within a period of three years, we sustained the constitutionality of the concept of amortization. As long as the amortization period is reasonable, it should be upheld. (See Ann., Nonconforming Uses—Amortization, 22 ALR 3d 1134, *supra*; 82 Am Jur 2d, Zoning and Planning, § 188.) Whether an amortization period is reasonable is a question which must be answered in light of the facts of each particular case. (See Ann., Nonconforming Uses—Amortization, 22 ALR 3d 1134, *supra*.) Certainly, a critical factor to be considered is the length of the amortization period in relation to the investment. (See *Los Angeles v Gage*, 127 Cal App 2d 442; *National Adv. Co. v County of Monterey*, 1 Cal 3d 875, cert den 398 US 946.) Naturally, as the financial investment increases in dimension, the length of the amortization period should correspondingly increase. Similarly, another factor considered significant by some courts is the nature of the nonconforming activity prohibited. Generally a shorter amortization period may be provided for a nonconforming use as opposed to a nonconforming structure. (See, e.g., *Gurnee v Miller*, 69 Ill App 2d 248.)

In essence, however, we believe the critical question which must be asked is whether the public gain achieved by the exercise of the police power outweighs the private loss suffered by owners of nonconforming uses. (See, e.g., *Grant v Mayor and City Council of Baltimore*, 212 Md 301.) While an owner need not be given that period of time necessary to permit him to recoup his investment entirely (see Comment, *The Abatement of Pre-existing Nonconforming Uses Under Zoning Laws: Amortization*, at p 332, *supra*), the amortization period should not be so short as to result in a sub-

stantial loss of his investment. (See *Harbison v City of Buffalo*, 4 NY2d 553, 563; *People v Miller*, 304 NY 105, 109.) If an owner can show that the loss he suffers as a result of the removal of a nonconforming use at the expiration of an amortization period is so substantial that it outweighs the public benefit gained by the legislation, then the amortization period must be held unreasonable.

In determining what constitutes a substantial loss, a court presented with a challenge to a prohibition of billboards similar to the statute in this case should look to, for example, such factors as: initial capital investment, investment realization to date, life expectancy of the investment, the existence or nonexistence of a lease obligation, as well as a contingency clause permitting termination of the lease. As a general rule, most regulations requiring the removal of nonconforming billboards and providing a reasonable amortization period should pass constitutional muster. In concluding as we do, we note that courts in a number of other jurisdictions have passed favorably upon legislative pronouncements requiring removal of nonconforming billboards within amortization periods of varying lengths. (See, e.g., *Murphy Inc. v Board of Zoning Appeals*, 147 Conn 358 [2 years]; *National Adv. Co. v. County of Monterey*, 1 Cal 3d 875, cert den 398 US 946 [1 year]; *Western Outdoor Adv., Co. v. City of Miami*, 256 So 2d 556 [5 years]; *Art Neon Co. v City and County of Denver*, 488 F2d 118, cert den 417 US 932 [2 to 5 years].)

Because of the procedural posture in which this case comes to us, we are unable to determine whether, as applied, the 6-1/2 year amortization period provided in section 9-0305 of the Environmental Conservation Law is unreasonable. It is clear that in granting summary judgment for the defendant, both the trial court and the Appellate Division concluded, as a matter of law, that the Legislature may constitutionally require the removal of billboards pursuant to the police power without com-

pensating those owners adversely affected. As a result, the reasonableness of the amortization period, as a question of fact, was never addressed by either the parties in opposition to or support of the cross-motion for summary judgment or by the courts. For this reason, we believe a remand for an immediate hearing is required to provide plaintiff with an opportunity to establish, if it can, that the statutory amortization period of six and one-half years is unreasonable, as applied.

In reaching our conclusion, we reject plaintiff's contention that section 88 of the Highway Law, enacted pursuant to the Federal Highway Beautification Act of 1965 (23 USC § 131) requires that compensation be provided for the removal of billboards located within 660 feet of federally-aided highways. By choosing to provide compensation for billboards removed to beautify federally-aided highways, the Legislature did not relinquish its authority to promote general welfare under the police power without compensating property owners adversely affected by the regulation.

Finally, we similarly reject plaintiff's contention that section 9-0305 of the Environmental Conservation Law is violative of the First Amendment guarantee of free speech. (See *Suffolk Outdoor Adv. Co. v Hulse*, _____ NY2d _____[decided herewith].)

Accordingly, the order of the Appellate Division should be reversed and the case remanded to Supreme Court, Albany County, for further proceedings in accordance with this opinion.

Order reversed, with costs, and the case remitted to Supreme Court, Albany County, for further proceedings in accordance with the opinion herein. Appeal by "Proposed Intervenor" Dale dismissed, with costs, upon the ground that it does not lie. Opinion by Jasen, J. All concur.

Decided December 21, 1977

APPENDIX B

STATE OF NEW YORK SUPREME COURT
 APPELLATE DIVISION THIRD DEPARTMENT

MODJESKA SIGN STUDIOS, INC.,

Appellant,

- against -

PETER A. A. BERLE, as Commissioner of the Department
 of Environmental Conservation
 of the State of New York,

Respondent,

- and -

CHARLES A. DALE, JR., as President and on
 Behalf of the Outdoor Advertising Association
 of New York, an Unincorporated Association,
 Proposed Intervenor-Plaintiff-Appellant.

Before:

HON. HAROLD E. KOREMAN,

Presiding Justice

HON. LOUIS M. GREENBLOTT,

HON. A. FRANKLIN MAHONEY,

HON. ROBERT G. MAIN,

HON. J. CLARENCE HERLIHY,

Associate Justices.

APPEAL by plaintiff from an order and judgment of the Supreme Court at Special Term (Harold J. Hughes, J.), entered August 23, 1976 in Albany County, which denied plaintiff's motion for a preliminary injunction restraining defendant from enforcing section 9-0305 of the Environmental Conservation Law, granted defendant's cross motion for summary judgment dismissing the complaint and declared section 9-0305 to be constitutionally valid; appeal by the proposed intervenor from so much of said order

and judgment as denied his motion to intervene in the action as a plaintiff.

January 20, 1977.

29865

MODJESKA SIGN STUDIOS, INC., Appellant,

v.

PETER A.A. BERLE, as Commissioner of the Department
 of Environmental Conservation of the State of New York,
 Respondent,

and

CHARLES A. DALE, JR., as President and on Behalf of
 the Outdoor Advertising Association of New York, an
 Unincorporated Association,

Proposed Intervenor-Plaintiff-Appellant.

Order and judgment affirmed, without costs. Appeal by proposed intervenor-plaintiff dismissed, as moot, without costs.

Opinion per MAHONEY, J.

KOREMAN, P.J., GREENBLOTT, MAIN and
 HERLIHY, JJ., concur.

JAECKLE, FLEISHMANN & MUGEL (Henry W. Killeen, III, of counsel), for Charles A. Dale, Jr., proposed intervenor-plaintiff-appellant, 700 Liberty Bank Building, Buffalo, New York 14202.

OPINION FOR AFFIRMANCE

29865

MAHONEY, J.

Plaintiff is the owner of approximately 96 outdoor advertising signs over 95% of which are located within 660 feet of federally-aided highways passing through the Catskill Park. Section 9-0305 of the Environmental Con-

ervation Law prohibits the erection and/or maintenance of advertising signs and structures within the Catskill and Adirondack Parks without a written permit of the Department of Environmental Conservation but provides that all such signs within the Catskill Park as of May 26, 1969 may be continued without permit until January 1, 1976. All parties agree that all 96 of plaintiff's signs are ineligible for permits under rules promulgated by the Department (6 NYCRR 195) and, accordingly, on January 1, 1976 were subject to removal.

Plaintiff commenced this action almost six years subsequent to the effective date of the predecessor to section 9-0305 and only two weeks before the date written permission from the Department was a requisite to prevent sign removal. Thereafter, plaintiff moved for a preliminary injunction restraining the enforcement of section 9-0305 of the Environmental Conservation Law on the ground that it is unconstitutional, alleging, *inter alia*, that section 88 of the Highway Law requires payment of just compensation for the removal of signs located within 660 feet of federally-aided roads. Defendant cross-moved for an order dismissing the complaint.

We turn first to plaintiff's contention that section 88 of the Highway Law requires payment of just compensation for the removal of all signs in the Catskill Park located within 660 feet of federally-aided highways. While it is true that the Federal Highway Beautification Act of 1965 (U.S. Code, tit. 23, §§ 131, 136, 319) declared it to be a national policy that states should seek to establish control of outdoor advertising by prohibiting erection and maintenance of outdoor advertising in noncommercial areas, and, further, that any taking of such signs or structures by the states should result in the payment of compensation (U.S. Code, tit. 23, § 131, subd. [g]), it is not true that compliance by the states was mandatory. In fact, the Beautification Act provides

that if a state does not make legislative provision for such control and payment, it shall lose 10% of the federal highway funds which would otherwise be apportioned to such state. Therefore, since New York did enact section 88 of the Highway Law in response to the previously passed Beautification Act, the question posited is whether section 88 committed this State to a program of compensation for dismantled advertising signs, the Beautification Act and section 88 of the Highway Law being statutes *in pari materia*, or if New York by enacting section 9-0305 of the Environmental Conservation Law can, and, in fact, did choose a different legislative approach in providing an amortization period rather than payment of compensation. Posed differently, did this State by passing section 88 of the Highway Law mandating the payment of compensation for commercial sign discontinuance in the Catskill Park, in response to the Federal Act, relinquish its right to act in the same area pursuant to its police powers? In our view, the State did not. While we find no New York case on point, the case of *Markham Advertising Co. v. State* (439 P. 2d 248 [Wash.], app. dsmd. 393 U.S. 316) is remarkably similar to the facts herein. In *Markham*, advertising companies challenged a state act providing for the regulation of outdoor signs, which Act provided for amortization rather than compensation, on the ground that the Beautification Act of 1965 compelled the payment of compensation. In rejecting this contention the *Markham* court stated, "If Congress had intended the provisions of 23 U.S.C. § 131 *** to be mandatory on the states, there would have been no need to attach a monetary penalty to noncompliance" (*id.* at 257). We agree.

A reading of section 9-0305 readily reveals an aesthetic purpose to conserve the natural beauty of the Catskill Park and to preserve and regulate the Park for the public use and general welfare of the peoples of this State (*People v. Goodman*, 31 N Y 2d 262). Since the thrust of the subject statute

is the accomplishment of legitimate goals for public purposes, it is regulatory not prohibitory. It does not bar outdoor advertising. It requires a permit, thus insuring regulatory control of a State asset. That this type of outdoor sign regulation is a proper and valid exercise of the police power has ample support in the decisional law (*People v. Goodman, supra*; *Whitmier & Ferris Co. v. State of New York*, 20 N Y 2d 413; *Terrace Hotel Co. v. State of New York*, 19 N Y 2d 526; *Matter of Cromwell v. Ferrier*, 19 N Y 2d 263; *New York State Thruway Auth. v. Ashley Motor Court*, 10 N Y 2d 151; *Rochester Poster Adv. Co. v. Town of Brighton*, 49 A D 2d 273). However, legislation whose legitimacy is measured against an aesthetic purpose must meet the test of reasonableness. That test, in turn, can be evaluated in the setting of its implementation. The Adirondack and Catskill State Parks are constitutionally protected preserves (N.Y. Const., art. XIV) wherein special material and cultural values exist which are deserving of preservation for future generations. Thus, objects, such as outdoor advertising structures, that offend the eye and detract from the natural beauty of the setting are legitimate targets of legislation requiring their removal providing the totality of the means employed is reasonable (*People v. Goodman, supra*). Plaintiff's challenge to the means employed herein embodies the complaint that to take such structures without monetary compensation to alleviate all economic loss is an unconstitutional taking of private property in violation of the restraints of the Fifth and Fourteenth Amendments of the Federal Constitution and sections 6 and 7 of Article I of the New York State Constitution. This contention is meritless.

The Court of Appeals has consistently held that the State need not pay any compensation where signs are regulated pursuant to the State's police power. In *New York State Thruway Auth. v. Ashley Motor Court (supra)* it was held that the police power extends to all the great public needs

and if the means employed to regulate existing offending signs are reasonable, there can be no objection to their employment on the ground that "the rights to private property are curtailed". Similarly, in *Whitmier & Ferris Co. v. State of New York (supra)* our highest court stated that offending signs abutting the Thruway could be constitutionally removed without the payment of compensation. As noted in both *Ashley Motor Court* and *Whitmier & Ferris*, billboards and advertising signs are of little value and small use unless great highways bring the travelling public within view of them, and their enhanced value when they are seen by large numbers of people was created by the State in the construction of the roads and not by the signs' owners. In this context, then, this court shall not balance the economic advantages between compensation and amortization, noting only that a reasonable period of amortization to enable one to recoup his investment has been held to be constitutionally valid (*Matter of Harbison v. City of Buffalo*, 4 N Y 2d 553). It is enough to note that the State, despite the passage of section 88 of the Highway Law, is not compelled to appropriate outdoor advertising signs pursuant to that section and pay compensation to the sign owners. The state can and has elected to cause offending sign removal within the Catskill Park by employing its police powers in a manner that is reasonable and fair. Whatever economic value plaintiff's 96 signs have can largely be attributed to the natural beauty of the Catskill Park preserve that attracts motoring tourists and it was not unreasonable to require plaintiff to remove the non-qualifying signs over a period of six and one-half years to insure the continuity of priceless aesthetic values.

Plaintiff's contention that section 9-0305 of the Environmental Conservation Law is unconstitutional because it violates the First Amendment guarantee of free speech is without merit. Despite the extension of the First Amend-

ment protections to include commercial speech (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, — U.S. — [May 24, 1976]), regulation of the same has not been precluded. Regulatory enactments that advance legitimate governmental purposes and do not foreclose alternate channels of communicating the same information are not constitutionally infirm. Herein, section 9-0305 does not prohibit outdoor advertising signs within the Park, it regulates them so as to control ugliness, distractions and deterioration (*Matter of Cromwell v. Ferrier*, *supra*) which can result from the maintenance of offending signs. The same information can be conveyed to the public by newspaper, radio or television advertising.

Similarly, plaintiff's equal protection argument is meritless. As we said in *Matter of Greenburgh No. 11 Federation of Teachers, Local 1532, Amer. Federation of Teachers, ALF-CIO v. Helsby* (41 A D 2d 329, app. dsmd. 33 N Y 2d 664) "[t]he Legislature may make classifications *** without infringement of the equal protection guarantee, and its discretion in this regard is broad and will not be disturbed *** provided only that it shall not be palpably arbitrary (*Matter of Dorn "HH" v. Lawrence "II"*, 31 NY 2d 154 [app. dsmd. 409 U.S. 1121])" (*id.* at 331). Section 9-0305 seeks to regulate outdoor signs that offend aesthetic values. Such legislation is neither an improper classification of signs nor is it "palpably arbitrary".

Next the legislation under attack is not violative of plaintiff's civil rights because it may deprive plaintiff of income from a lawfully established business. The police power is the "least limitable of the powers of government and * * * extends to all the great public needs" (*People v. Nebbia*, 262 N.Y. 259, 270, affd. 291 U.S. 502) and if the end desired and the means employed by the sovereign to attain those ends are reasonable, it is no objection that "the rights of private property are thereby curtailed." (*New York State Thruway Auth. v. Ashley Motor Court*, *supra*, p. 157.)

One of the distinguishing features of the police power is the preferment of the public interest over the private interest.

Having concluded that Special Term was correct in granting defendant's cross-motion for a declaration that section 9-0305 is constitutional, the issues concerning the denial of the motions for a preliminary injunction and for intervention have been rendered moot.

The order and judgment should be affirmed, without costs. The appeal by proposed-intervenor-plaintiff should be dismissed, as moot, without costs.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

MODJESKA SIGN STUDIOS, INC.,

Plaintiff,

-against-

PETER A. A. BERLE, Individually, and as
Commissioner of the Department of
Environmental Conservation of the State
of New York,

Defendant.

(Supreme Court, Albany County Special Term, Part I,
March 26, 1976)
(Calendar No. 12)
(JUSTICE HAROLD J. HUGHES, Presiding)

* * *

HUGHES, J.:

Plaintiff has moved for a preliminary injunction restraining defendant from enforcing section 9-0305 of the Environmental Conservation Law which regulates the use of advertising signs in the Catskill Park. The motion was brought on by an order to show cause which temporarily restrained the enforcement of this statute pending determination of the motion. Defendant has cross-moved for an order dismissing the complaint and has requested that the

motion be treated as one for summary judgment pursuant to subdivision (c) of CPLR 3211. Finally, one Charles A. Dale, Jr., president of the Outdoor Advertising Association of New York, has moved to intervene as an additional party plaintiff.

The essential facts do not appear to be in dispute. Plaintiff is the owner of approximately 97 outdoor advertising signs located in the Catskill Park, all of which were erected prior to the enactment of section 9-0305 of the Environmental Conservation Law. Apparently, over 95 per cent of these signs are located within 660 feet of various Federally-aided primary highways located in the Catskill Park.

Section 9-0305 prohibits the erection of advertising signs or structures within the Catskill and Adirondack Parks, except under written permit from the Department of Environmental Conservation. It provides that signs within the Catskill Park existing prior to May 26, 1969, the date when the section was made applicable to the Catskill Park, may continue to be maintained without a permit until January 1, 1976. The parties agree that plaintiff's signs are not eligible for permits under rules promulgated by the Department of Environmental Conservation (See 6 NYCRR Part 195), and, hence, on January 1, 1976 the signs were subject to removal.

Plaintiff commenced this action seeking: (i) a declaratory judgment that section 9-0305 of the Environmental Conservation Law is unconstitutional on several grounds including that it requires the removal of the advertising signs without just compensation; (ii) a declaratory judgment that section 88 of the Highway Law requires payment of just compensation for the removal of those signs that are located within 660 feet of any interstate or Federally-aided primary highways; and (iii) a permanent injunction preventing defendant from removing plaintiff's signs without paying just compensation.

Before addressing plaintiff's constitutional arguments, let us turn to plaintiff's contention that section 88 of the Highway Law requires payment of just compensation for the removal of the majority of plaintiff's signs which are located within 660 feet of Federally-aided primary highways running through the Catskill Park.

Section 88 was enacted to implement the Federal Highway Beautification Act (L. 1968, ch. 581, §1). Subdivision 7 thereof provides that compensation is to be paid for the taking of certain outdoor advertising signs and displays. Basically, compensation is to be paid for those signs that were lawfully in existence at the time they became subject to the provisions of section 88. Section 88 was enacted in 1968 and became effective on May 10, 1969.

Section 9-0305 of the Environmental Conservation Law, which prohibits the erection of advertising signs in the Catskill Park without a permit, is silent with respect to whether compensation must be paid for the removal of pre-existing signs which are not eligible to receive permits. Assuming for purposes of this motion that virtually all of plaintiff's signs would qualify for the payment of compensation under the provisions of section 88 of the Highway Law, the issue presented is whether the provisions of section 9-0305 of the Environmental Conservation Law require a different result.

Section 88 of the Highway Law was enacted by chapter 581 of the Laws of 1968. As indicated above, subdivision 7 of this section explicitly provides for the payment of compensation for the taking of certain pre-existing advertising signs. Section 9-0305 was made applicable to the advertising signs in the Catskill Park by chapter 1052 of the Laws of 1969, and makes no mention of the payment of compensation. Chapter 1052, in fact, provided for an amortization period to be fixed individually for each pre-existing advertising sign in the Catskill Park. This would appear to clearly show a legislative intent to provide an amortization period as an alternative to the payment of compensation for

pre-existing advertising signs in the Catskill Park. Chapter 392 of the Laws of 1970 further amended this section to provide a fixed amortization period of approximately 6-1/2 years rather than the original, individually determined, amortization periods. This would appear to further strengthen the conclusion that the Legislature specifically considered the issue of compensation for the removal of pre-existing signs in the Catskill Park and concluded that an amortization period rather than monetary compensation was to be provided. This conclusion is supported by language in the decision of the Appellate Division, Fourth Department in *Rochester Poster Adv. Co. v. Town of Brighton* (49 A D 2d 273, 276):

"... the enactment by the Legislature of section 9-0305 of the Environmental Conservation Law—limiting the continuance of nonaccessory signs without compensation—..."

While the decision in *Rochester Poster Adv. Co.* did not involve the construction of section 9-0305, the Appellate Division did specifically consider the effect of section 88 of the Highway Law in a similar situation and the quoted language indicates that the Court implicitly construed section 9-0305 as precluding the payment of monetary compensation.

The court finds, then, that section 9-0305 does not require the payment of compensation for the removal of advertising signs for which compensation would otherwise be required by section 88 of the Highway Law. Plaintiff's argument that this conclusion means that under the provisions of the Federal Highway Beautification Act (U.S.C., tit. 23) this will require a ten per cent reduction in Federal highway funds payable to the State is irrelevant. For even if plaintiff's analysis of the effect of the court's construction of the pertinent statutory provisions on the amount of Federal aid is correct, that cannot, of course,

change the meaning of the language that the Legislature has enacted.

Turning now to the constitutional objections that have been raised, plaintiff first contends that section 9-0305 violates the Fifth and Fourteenth Amendments of the United States Constitution and section 7 (subd.[a]) of article I of the State Constitution which prohibit the taking of property by the State without the payment of just compensation. It is clear, however, that the State may regulate the erection and maintenance of outdoor advertising under the police power (see, e.g., *Railway Express v. New York*, 366 U.S. 106; *People v. Goodman*, 31 N Y 2d 262; and *New York State Thruway Auth. v. Ashley Motor Court*, 10 N Y 2d 151). In fact, the predecessor to present section 9-0305 was upheld as a valid exercise of the police power many years ago by the Appellate Division, Third Department, in *People v. Sterling* (257 App. Div. 560). The opinion in a subsequent appeal involving the same parties implied that the statute could not be sustained as an exercise of the police power for aesthetic considerations alone, although the court found it unnecessary to decide that constitutional issue (*People v. Sterling*, 267 App. Div. 9). Subsequent decisions have resolved that issue, and it is now well settled that outdoor advertising signs may be regulated pursuant to the police power for aesthetic purposes alone (see, e.g., *People v. Goodman*, 31 N Y 2d 262, *supra*; *People v. Stover*, 12 N Y 2d 462; and *Matter of Cromwell v. Ferrier*, 19 N Y 2d 263). Many statements have been written explaining this result in terms of the importance of aesthetic values to society, but perhaps no one has expressed this view more memorably than Chief Judge Pound in what has been described as an "oratorical flight":

"Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency." (*People v. Sterling*,

267 App. Div. 9, 12, *supra*, quoting *Perlmutter v. Greene*, 259 N. Y. 327, 332).

Of course, as with every enactment under the police power, the means adopted in the statute in question must be reasonably related to the community policy sought to be implemented and must not be unduly oppressive (*Matter of Tyson, Inc. v. Tyler*, 24 N Y 2d 671; *People v. Bunis*, 9 N Y 2d 1; and *People v. Munoz*, 9 N Y 2d 51). "The exercise of the police power should not extend to every artistic conformity or nonconformity. Rather, what is involved are those aesthetic considerations which bear substantially on the economic, social and cultural patterns of a community or district" (*Matter of Cromwell v. Ferrier*, *supra*, p. 272).

In creating the Catskill Park and in extending the applicability of section 9-0305's regulation of outdoor advertising signs to the Park, the Legislature has recognized the special natural beauty of the land in the Park and has acted to conserve and preserve the area for future generations in its relatively unspoiled and undeveloped condition (Environmental Conservation Law, § 9-0305, subd. 1). The special importance of the Catskill Park is emphasized by the protection afforded it by the State Constitution (art. XIV). This is not a case where the Legislature has gone too far in the name of aesthetics (see *People v. Stover*, 12 N Y 2d 462, 468, *supra*). The statute has a valid objective under the police power, the means employed are reasonably related to this objective and, under all the circumstances, the legislation is not arbitrary, unreasonable or oppressive.

Plaintiff further contends that the statute is unconstitutional because all of its signs were in existence prior to the effective date of the applicability of the statute to the Catskill Park. The police power, however, is the "least limitable of the powers of government" (*People v. Nebbia*, 262 N.Y. 259, 270, *affd.* 291 U.S. 502). Even assuming that

the plaintiff possessed valid and subsisting property rights which the statute in question abrogated, this would not appear to provide a sufficient basis for declaring the statute in question unconstitutional (*Whitmier & Ferris Co. v. State of New York*, 20 N Y 2d 413; *Terrace Hotel Co. v. State of New York*, 19 N Y 2d 526; and *New York State Thruway Auth. v. Ashley Motor Court*, 10 N Y 2d 151, *supra*). In any event, the statute in question actually allows a 6-1/2 year amortization period for pre-existing signs. Nonconforming uses may be eliminated by amortization over a reasonable period of time (*Matter of Off Shore Rest. Corp. v. Linden*, 30 N Y 2d 160, 164; *Matter of Harbison v. City of Buffalo*, 4 N Y 2d 553, 561) and a 6-1/2 year period would seem to be a reasonable amortization period for such outdoor advertising signs (see, e.g., *People v. Goodman*, 31 N Y 2d 262, *supra* [2-year amortization period]; *Rochester Poster Adv. Co. v. Town of Brighton*, 49 A D 2d 273, *supra* [34-month amortization period]).

Plaintiff also contends that the statute in question violates the First Amendment guarantee of free speech. In *New York State Thruway Auth. v. Ashley Motor Court* (10 N Y 2d 151, *supra*, mot. to amend remittitur granted 10 NY 2d 814), the Court of Appeals specifically held that just such an outdoor advertising statute did not infringe upon the constitutional guarantees of freedom of speech and freedom of the press under the First Amendment. However, subsequent to that decision, the United States Supreme Court has now made it clear that commercial speech is protected by the First Amendment (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, ___ U.S. ___ [May 24, 1976], 48 L Ed. 2d 346). It is also clear, however, that some forms of commercial speech regulation are still permitted. Restrictions with respect to time, place and manner, for example, are still permissible, provided that they are justified without reference to the content of the regulated speech, that they serve a significant

government interest, and that in so doing they leave open ample alternative channels for communication of the information (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 48 L Ed. 2d, *supra*, pp. 363, 364). In the present case, there is no regulation with respect to the content of the advertising, the regulation is intended to serve the important governmental interest implicit in the exercise of the police power, and there are ample other channels of communication available in the affected area such as radio, television and newspapers. This court simply does not believe that the First Amendment, however cherished its protections may be, will be applied to preclude the State from adopting reasonable measures to control the "ugliness, distraction and deterioration" (*Matter of Cromwell v. Ferrier*, 19 N Y 2d 263, *supra*, p. 272) which can result from the erection of advertising signs and billboards.

The court also finds plaintiff's equal protection argument to be without merit. Exact equality is not a prerequisite to equal protection within the meaning of the Fourteenth Amendment (*Norvell v. Illinois*, 373 U.S. 480; and *Atchinson. Topeka & Santa Fe R. R. Co. v. Matthews*, 174 U.S. 96).

Since the plaintiff has failed to establish a "clear right" to the relief requested, its motion for a preliminary injunction must be denied (7A Weinstein-Korn-Miller, N. Y. Civ. Prac., §6301.18).

Finally, the court finds that the Outdoor Advertising Association of New York is not entitled to intervene as a party plaintiff as of right since the interests of the Association have been adequately represented by the plaintiff in this action and the action does not involve a disposition of or claim for damages to property in which the Association may be adversely affected by the judgment (CPLR 1012, subd.[a]). The court will not exercise its

discretion to allow the Association to intervene by permission pursuant to CPLR 1013 since the intervention would serve to unduly delay the determination of the action.

Plaintiff's motion for a preliminary injunction and the motion of the Outdoor Advertising Association of New York to intervene are denied, and the cross motion of the defendant for summary judgment declaring the subject statute to be valid is granted, all without costs.

Dated: August 4, 1976.

APPENDIX D

Remittitur

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Charles D. Breitell, Chief Judge, Presiding

3 No. 544

Modjeska Sign Studios, Inc.,

Appellant,

vs.

Peter A.A. Berle, Individually, and as Commissioner of the
Department of Environmental
Conservation, &c.,

Respondent,

Charles A. Dale, Jr., as

President &c., Outdoor

Advertising Association of

New York, &c.,

Proposed Intervenor-Appellant.

* * *

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and the case remitted to Supreme Court, Albany County, for further proceedings in accordance with the opinion herein. Appeal by "Proposed Intervenor" Dale dismissed, with costs, upon the ground that it does not lie. Opinion by Jasen, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Donald M. Sheraw
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 21, 1977.

APPENDIX E

3 Mo. No. 144
Modjeska Sign Studios, Inc.,
Appellant,
vs.
Peter A.A. Berle, Individu-
ally and as Commissioner &c.,
Respondent.

& 3 other actions:
Suffolk Outdoor Advertising
Co., Inc. v. Hulse.
Collum Signs, Inc., v. Town
Board Town of Southampton.
Frank J. Polacek Jr. v. Town
Board Town of Southampton.

Motion by Modjeska Sign Studios, Inc. and Suffolk Outdoor Advertising Co., Inc. for reargument of the appeals and for stays or, in the alternative, to amend the remittiturs herein denied with twenty dollars costs and necessary reproduction disbursements.

Decision Court of Appeals Feb. 22, 1978.

APPENDIX F

COURT OF APPEALS OF THE STATE OF NEW YORK

MODJESKA SIGN STUDIOS, INC.,

Plaintiff-Appellant,

-vs-

PETER A.A. BERLE, Individually, and as
Commissioner of the Department of Environmental
Conservation of the State of New York,
Defendant-Respondent.

INDEX NO. 8341-76

Case #544

NOTICE OF APPEAL TO THE SUPREME COURT OF
THE UNITED STATES

NOTICE is hereby given that MODJESKA SIGN STUDIOS, INC., the plaintiff above named, hereby appeals to the Supreme Court of the United States from the judgment and order of the Court of Appeals of the State of New York dated December 21, 1977, together with the decision of the Court of Appeals denying reargument in said action dated February 22, 1978, upon which judgment was duly entered with the Clerk of the Supreme Court, County of Albany on March 3, 1978.

This appeal is taken pursuant to 28 U.S.C.S. 1257(2).

HANCOCK, ESTABROOK, RYAN, SHOVE
& HUST

Carl W. Peterson, Jr., of Counsel
Counsel for Plaintiff
One MONY Plaza
Syracuse, New York 13202

Dated: March 30, 1978.

NOTICE OF APPEAL TO THE SUPREME COURT OF
THE UNITED STATES

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ALBANY

MODJESKA SIGN STUDIOS, INC.,

Plaintiff-Appellant,

-against-

PETER A.A. BERLE, Individually, and as
Commissioner of the Department of Environ-
mental Conservation of the State of New
York,
Defendant-Respondent.

Index No. 8341-76

NOTICE is hereby given that MODJESKA SIGN STUDIOS, INC., the plaintiff above named, hereby appeals to the Supreme Court of the United States from the judgment and order of the Court of Appeals of the State of New York dated December 21, 1977, together with the decision of the Court of Appeals denying reargument in said action dated February 22, 1978, upon which judgment was duly entered with the Clerk of the Supreme Court, County of Albany on March 3, 1978.

This appeal is taken pursuant to 28 U.S.C.S. 1257(2).

Dated: May 11, 1978

HANCOCK, ESTABROOK, RYAN, SHOVE & HUST

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APPENDIX G

§ 9-0101. Definitions

The following words and phrases, when used in this article, unless otherwise expressly stated, are defined as follows:

* * *

2. The "Catskill park" shall include all lands located in the counties of Greene, Delaware, Ulster and Sullivan within the following described boundaries, to wit: Beginning in Ulster county at the intersection of the easterly line of the Hardenburgh Patent with the southerly bounds of the Rondout Reservoir; thence running southwesterly along the easterly line of Great Lot 4 of the Hardenburgh Patent to the southeasterly corner of lot one of the East Allotment, east division of Great Lot 4; thence northwesterly along the southerly bounds of lots one, 7, 8, 14, 17, 22, 26, 33, 37 and 46 of said East Allotment, east division of Great Lot 4 and along the southerly bounds of lots 67, 49, 48, 47, 46, 45, 44, 43, 42 and 41 of the Middle Allotment, east division of Great Lot 4 to the center of the Neversink creek; thence northerly along the center of the Neversink creek to the southeasterly corner of lot 37 of the West Allotment, east division of Great Lot 4; thence northwesterly along the southerly bounds of lots 37, 27, 22, 11 and 6 of said West Allotment, east division of Great Lot 4 to a point in the easterly line of the town of Rockland in Sullivan county; thence southerly along the easterly line of the town of Rockland in Sullivan county to the northeasterly corner of the town of Liberty; thence northwesterly along the northerly line of the town of Liberty in Sullivan county to the southwesterly corner of lot 120 of the East Allotment, middle division of Great Lot 4; thence northwesterly along the southerly bounds of lots 119 and 118 of the East Allotment, middle division of Great Lot 4 to a point in the center of the

Willowemoc creek; thence westerly down the center of the Willowemoc creek to its confluence with the Beaver Kill; thence northwesterly down the center of said Beaver Kill to the southwesterly line of the town of Colchester in Delaware county; thence northwesterly along said southwesterly line of the town of Colchester in Delaware county to the westerly bank of the east branch of the Delaware river; thence along the westerly bank of the said east branch of the Delaware river and the westerly bounds of the Pepacton reservoir to its intersection with the mouth of the Bush Kill at or near the village of Arkville; thence up along the center of said Bush Kill to the New York Central Railroad; thence along the said New York Central Railroad easterly to the line between the counties of Delaware and Ulster; thence northeasterly along that line to the southerly line of Greene county; thence northwesterly along the southerly line of Greene county to the southwesterly corner of Great Lot No. 21, Hardenburgh Patent; thence northeasterly along the westerly line of said Great Lot No. 21; Hardenburgh Patent to the south bank of the Batavia Kill; thence along the southerly bank of the Batavia Kill easterly to the west line of the State Land Tract; thence northerly, easterly and southerly along the line of the said State Land Tract to the line of the Hardenburgh Patent; thence easterly and southerly along the general easterly line of the Hardenburgh Patent to the southwest corner of the town of Saugerties in Ulster county; thence easterly along the southerly line of the town of Saugerties to the westerly bounds of the New York State Thruway; thence southerly along the westerly bounds of the said New York State Thruway to the northerly bounds of the Esopus creek; thence in a general westerly direction up and along the northerly bounds of said Esopus creek to its intersection with the southwesterly line of the town of Ulster; thence northwesterly to the southeast corner of the Hurley Patentee Woods Allotment; thence in a general southwesterly direction along the southeasterly line of the Hurley Patentee

Woods Allotment to the northerly line of the town of Marbletown; thence northwesterly along said northerly line of the town of Marbletown to the town of Olive; thence southwesterly along the line between the towns of Olive and Marbletown to the line of the town of Rochester; thence northwesterly along the line between the towns of Olive and Rochester to the point where the Mettakahonts creek crosses the same flowing easterly; thence southwesterly parallel with the northwesterly line of the town of Rochester to the southerly bounds of the Rondout creek; thence westerly along the southerly bounds of the Rondout creek and the southerly bounds of the Rondout Reservoir to the easterly line of the Hardenburgh Patent, the point or place of beginning.

§ 9-0305. Signs and advertising in Adirondack and Catskill parks

1. In order to conserve the natural beauty of the Adirondack and Catskill parks, to preserve and regulate the said parks for public uses for the resort of the public for recreation, pleasure, air, light and enjoyment, to keep them open, safe, clean, and in good order for the welfare of society, and to protect and conserve the investment of the state in forest lands, campsites and other interests in real property in said parks, no person shall erect or maintain within the boundaries thereof any advertising sign, advertising structure or device of any kind, except under written permit from the department. The provisions of this section shall not apply to signs erected or maintained upon a parcel of real property in connection with the principal business or principal businesses conducted thereon and which advertise such business or businesses only, or to signs within the limits of an incorporated village.

As to signs, structures or devices existing within the Catskill park on May 26, 1969, and which require a permit

pursuant to this section, the same may continue to be maintained without permit until January 1, 1976 provided that the property owner or owner of such sign, structure or device registers the same with the department on or before January 1, 1972.

As to signs, structures or devices existing on May 31, 1972 in those portions of the Adirondack park added thereto by chapter six hundred sixty-six of the laws of nineteen hundred seventy-two, and which require a permit pursuant to this section, the same may continue to be maintained without permit until January 1, 1978, provided that the property owner or owner of such sign, structure or device registers the same with the department on or before January 1, 1975.

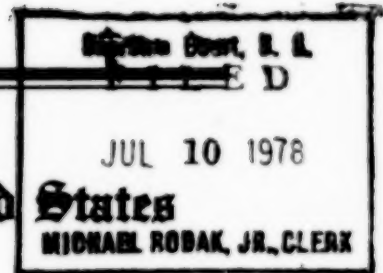
2. Whenever a sign, structure or device has been erected or is being maintained in violation of the provisions of subdivision one of this section, the commissioner shall cause a notice of such violation, specifying as nearly as may be the nature and location of such sign, structure or device, to be personally served upon the owner of record of the real property upon which the same is located, hereinafter referred to as the property owner. In addition, a copy of such notice shall be personally served upon the owner of such sign, structure or device, if his name and address and the fact that he is the owner is clearly indicated thereon.

3. The property owner or the owner of such sign, structure or device shall remove the same within ten days from the date of the last service of such notice or copy thereof as hereinabove specified. In the event of the failure of the property owner or the owner to remove such sign, structure or device within such ten day period, the commissioner may cause an agent or employee of the department to enter upon the property where such sign, structure or device is located and to remove the same.

40a

4. No action for trespass or damages shall lie on account of entry upon private property by an authorized agent or employee of the department engaged in carrying out any of the provisions of this section.

In The
Supreme Court of the United States
October Term, 1977



No. 77-1671

MODJESKA SIGN STUDIOS, INC.,
Appellant,

v.

PETER A.A. BERLE,
Appellee.

On Appeal from the Court of Appeals
of the State of New York

MOTION TO DISMISS APPEAL

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In The
Supreme Court of the United States

October Term, 1977

No. 77-1671

MODJESKA SIGN STUDIOS, INC.,

Appellant,

v.

PETER A.A. BERLE,

Appellee.

**On Appeal from the Court of Appeals
of the State of New York**

MOTION TO DISMISS APPEAL

Appellee, Peter A.A. Berle, Commissioner of Environmental Conservation of the State of New York, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York, moves this Court, pursuant to Rule 16 of the Revised Rules of this Court, to dismiss the appeal herein on the following grounds:

I. This Court does not have jurisdiction to hear this appeal since the determination appealed from is not a "final determination" within the meaning of 28 U.S.C. § 1257(2);

II. No substantial Federal questions are presented by this appeal.

Opinion and Determinations Below

The opinion of the New York Court of Appeals, dated December 21, 1977, is reported at 43 NY2d 468 and is set forth as Appendix "A" to appellant's "Jurisdictional Statement" (hereinafter "J.S."), at pages 1a - 13a.

The Court of Appeals in its "Remittitur", also dated December 21, 1977 (J.S., App. "D", pp. 31a - 32a), "remitted the case to Supreme Court, Albany County, *for further proceedings* in accordance with the opinion herein".¹ (Emphasis ours.)

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

It is appellee's position (as discussed in Point I of "Argument", *infra*, pp. 8-10) that this Court does not have jurisdiction to hear this appeal.

Statutes Involved

I. Federal Statute

Appellant claims that the determination by the New York State Court of Appeals is a final judgment and, therefore, it may appeal to this Court therefrom pursuant to 28 U.S.C. § 1257(2), which, in relevant part, provides:

"§ 1257. State courts, appeal; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

¹Thereafter, the Court of Appeals, by order dated February 22, 1978 (J.S., App. "E", p. 39a) denied a motion by appellant herein (and by the appellant in a related case, entitled *Suffolk Outdoor Advertising Co. v. Hulse* [which case is being simultaneously appealed to this Court]), "for reargument of the appeals . . . or, in the alternative to amend the remittiturs herein . . .".

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

II. New York State Statute

The statute challenged on this appeal is § 9-0305 of the Environmental Conservation Law of the State of New York (hereinafter ECL, § 9-0305). This statute bars the erection or maintenance of any off-premises outdoor advertising signs, device or structure within the boundaries of the Adirondack and Catskill Parks² without a permit issued by the New York State Department of Environmental Conservation. This statute was made applicable to the Catskill Park by Laws of 1969, Chapter 1052, effective May 26, 1969, which provided that all signs in the Catskill Park not eligible for a permit were to be amortized over a period of time to be individually determined for each sign, and then removed.

By Laws of 1970, Chapter 392, effective May 1, 1970, the statute was further amended to provide a general amortization period of 6-1/2 years for signs in the Catskill Park, in place of the individually determined amortization periods.

The relevant portions of the statute, as currently in effect, provide:

"§ 9-0305. Signs and advertising in Adirondack and Catskill parks.

"1. In order to conserve the natural beauty of the Adirondack and Catskill parks, to preserve and regulate the said parks for public uses for the resort of the public for recreation, pleasure, air, light and enjoyment, to keep them open, safe, clean, and in good order for the welfare

²It should be noted that the state-owned lands, consisting of a substantial portion of said parks, are constitutionally protected and required to "be forever kept as wild forest lands." (N.Y.S. Cons., Art. XIV, Section 1.)

of society, and to protect and conserve the investment of the state in forest lands, campsites and other interests in real property in said parks, no person shall erect or maintain within the boundaries thereof any advertising sign, advertising structure or device of any kind, except under written permit from the department. The provisions of this section shall not apply to signs erected or maintained upon a parcel or real property in connection with the principal business or principal businesses conducted thereon and which advertise such business or businesses only, or to signs within the limits of an incorporated village.

"As to signs, structures or devices existing within the Catskill park on May 26, 1969, and which require a permit pursuant to this section, the same may continue to be maintained without permit until January 1, 1976 provided that the property owner or owner of such sign, structure or device registers the same with the department on or before January 1, 1972.

. . . .

Questions Presented

I. Is the opinion and order of remittitur of the New York State Court of Appeals — which reversed the order of the Appellate Division of the Supreme Court of the State of New York and remitted the case "for further proceedings in accordance with the opinion herein" — a final judgment within the meaning of 28 U.S.C. § 1257(2), thus giving this Court jurisdiction to hear this appeal?

II. Since it is well settled that a state statute regulating the place and manner of outdoor advertising signs for aesthetic purposes, and which contains an amortization period for phaseout of existing non-conforming signs, constitutes a valid exercise of the police power, and that such a statute neither violates the freedom of speech provisions of the First Amendment nor constitutes a deprivation of property without due process in violation of the Fourteenth Amendment, do claims that ECL, § 9-0305 violate the aforesaid provisions of the First and Fourteenth Amendments present substantial Federal questions warranting plenary review by this Court?

Statement

In its "Statement" (J.S., pp. 4-10), appellant sets forth an argumentative version of the "facts", liberally supplemented by statements of opinion and "facts" not contained in, nor supported by, the Record on Appeal before the New York State Court of Appeals. Appellant, by the paucity of its references to that Record, implicitly acknowledges that the bulk of its "facts" were not before the Court below.

We therefore set forth what we submit is the essential factual background of the case.

Appellant is the owner of approximately 96 outdoor advertising signs located in the Catskill Park (R. 92)³, all of which were erected prior to May 26, 1969, when the provisions now contained in ECL, § 9-0305 became applicable to the Catskill Park.

ECL, § 9-0305 prohibits the erection of off-premise advertising signs or structures within the Catskill or Adirondack Parks, except under written permit from the Department of Environmental Conservation. The statute expressly exempts from its scope all "signs within the limits of an incorporated village." It also provides that signs within the Catskill Park existing prior to May 26, 1969, may continue to be maintained without a permit until January 1, 1976. As stated at page 8 of Appellant's Jurisdictional Statement, appellant's signs are not eligible for permits under rules promulgated by the Department of Environmental Conservation and, hence, as of January 1, 1976, the signs were subject to removal.

Appellant commenced this action in the New York State Supreme Court, Albany County, for a declaratory judgment on December 30, 1975, by service of the summons (R. 23) and

³Unless otherwise noted, parenthetical references (R.) are to the Record on Appeal before the New York State Court of Appeals.

verified complaint (R. 24-41), together with an order to show cause (R. 18-20), seeking a preliminary injunction. Appellant's complaint contained allegations, *inter alia*, that ECL, § 9-0305 was unconstitutional on its face in that (a) it effects a deprivation of property without due process of law, in violation of the Fourteenth Amendment, and (b) it effects an impermissible abridgment of speech, in violation of the First Amendment.

Appellee cross-moved (R. 42-48) to dismiss the complaint for failure to state a cause of action and requested that such motion be treated as one for summary judgment, on the grounds that no material question of fact existed and the complaint raised solely questions of law which must, on the basis of settled decisional law of the State of New York, be decided in appellee's favor.

New York Supreme Court, Special Term, denied appellant's motion for a preliminary injunction and granted appellee's cross-motion for summary judgment declaring the subject statute to be constitutional (R. 9-17). The New York Appellate Division affirmed (R. 88-97).

The New York Court of Appeals (the State's highest Court) reversed the order of the Appellate Division and remitted the case to Supreme Court, Albany County "to provide plaintiff with an opportunity to establish, if it can, that the statutory amortization period of six and one-half years is unreasonable, as applied" (43 NY2d at p. 481 [J.S., App. "A", p. 12a]).

The Court of Appeals did, however, uphold the constitutionality of ECL, § 9-0305 on its face, stating, "we cannot agree with plaintiff's contention that ECL 9-0305 unreasonably deprives it of property without due process of law" (43 NY2d at p. 477 [J.S., App. "A", p. 7a]). The Court of Appeals, instead, held ECL, § 9-0305 to be a reasonable exercise of the police power, reaffirming its "prior decisions holding aesthetics to be a valid basis for the exercise of the police power (see *Suffolk Outdoor*

Adv. Co. v. Hulse, 43 NY2d 483 [decided herewith])" 43 NY2d at p. 473 [J.S., App. "A", p. 2a]). The Court further stated that the statute did not constitute a "taking" of property without due process, since "it cannot be said that the prohibition of billboards deprives landowners or their lessees of all reasonable use of their property" (43 NY2d at p. 477 [J.S., App. "A", pp. 6a-7a]).

The Court did go on to differentiate the regulation of billboards premised on highway safety from that based solely on aesthetics, holding that "it would have been unreasonable to require, solely for aesthetic purposes, the immediate removal of the billboards prohibited in the present case" (43 NY2d at p. 478 [J.S., App. "A", p. 8a]). Thus, the Court remanded the case for determination of the reasonableness of the 6½ year statutory amortization period, as applied to appellant's signs, holding that it could not decide this issue on the basis of the record before it.

The New York Court of Appeals also rejected appellant's contention that ECL, § 9-0305 violates the First Amendment's guarantee of free speech, citing its discussion of that issue in the *Suffolk* case (43 NY2d at p. 481 [J.S., App. "A", p. 12a]), *supra*. In that case, the Court held that the prohibition of non-accessory billboards to promote aesthetics constituted a permissible regulation of the place and manner of speech to effectuate a significant government interest (43 NY2d 483, 489).

Argument

POINT I

The determination appealed from — having remitted the case to a trial court for further proceedings involving a constitutional issue — is not a final judgment. Therefore, this Court does not have jurisdiction to hear this appeal.

Appellant baldly asserts (J.S., p. 3) that this Court has jurisdiction to hear this appeal pursuant to 28 U.S.C., § 1257 (2), which provision, of course, is applicable only where there has been a final judgment. However, appellant attempts to gloss over the actual determination made, by relegating to a footnote (Fn. "2", J.S., p. 3) the indisputable fact that the New York Court of Appeals remanded the matter for further proceedings involving a constitutional issue (whether the statute, as applied to appellant's billboards, effects a deprivation of property without due process). Appellant conclusorily asserts in this footnote that "there is no question as to the finality of the judgment", and in support of this blanket statement refers to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). It is submitted that there is, indeed, much question as to the finality of the judgment and, in claiming the contrary, appellant has misread or misinterpreted the *Cox Broadcasting* case.

In *Cox, supra*, this Court discussed in detail four exceptions which have developed to the traditional rule precluding review by this Court where anything further remains to be determined by a state court, upon remand or otherwise. However, none of the four exceptions would appear to apply to the case at bar. Each concerns a situation where *all* the federal question(s) involved have been finally determined and the further proceedings to be completed concerned only non-federal issues. These exceptions are further limited to cases in which the additional state proceedings will not conceivably involve other federal issues that could require Supreme Court review at a later date.

In the case at bar, the two federal issues involved are freedom of speech and deprivation of property without due process.⁴ While the New York Court of Appeals has made a final determination on the freedom of speech issue, there has not been any such final determination on the "taking" issue, since the remand is for the very purpose of providing "plaintiff with an opportunity to establish, if it can, that the statutory amortization period of six and one-half years is unreasonable, as applied" (43 NY2d at p. 481 [J.S., App. "A", p. 12a]). Surely, if appellant feels itself aggrieved by the determinations which remain to be made in the state courts as to the constitutionality of the amortization period as applied to its various billboards, it will, at such time in the future, still be able to claim that its property has been "taken" without due process — a federal issue which may be brought to this Court for review.

Thus, entertaining appellant's appeal at this time would not necessarily terminate the action, nor even preclude a later review by this Court of a federal question but, instead, might well result in the type "piecemeal" review which has always been eschewed by this Court. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948).

Moreover, it would seem that the case at bar is analogous to the eminent domain proceedings referred to by this Court in Footnote "6" of its opinion in the *Cox Broadcasting* case, *supra* (420 U.S. at pp. 477-478). In such cases, this Court has held that the state court judgment will not be considered as final unless it was dispositive of the entire case and adjudicated all issues including the issue of just compensation (see, also, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 [1945]). Accordingly, even though the First Amendment freedom of speech issue has been finally decided by the New York Court of Appeals, the Four-

⁴In any event, it is appellee's position that neither of these issues raise any substantial federal questions. See Point II, *infra*, pages 10-18.

teenth Amendment question of whether appellant has been deprived of property without due process has *not* been finally determined by the New York Court of Appeals and, therefore, it is submitted that this Court should not sever the First Amendment issue while another federal question remains open.

POINT II

No substantial federal questions are presented of this appeal, since it is well-settled that a statute, enacted pursuant to a state's police power, which: (A) merely regulates the place and manner of commercial advertising, such as billboards, does not infringe upon freedom of speech in violation of the First Amendment; and (B) provides an amortization period for phase-out of pre-existing uses to enable an owner to substantially recoup his investment in such property prior to discontinuance of the use thereof, does not deprive the owner of property without due process of law in violation of the Fourteenth Amendment.

The predecessor to ECL, § 9-0305 first became a law in 1924 (L. of New York 1924, c. 512) and, from its very inception, it is clear that it was a regulatory statute enacted pursuant to the State's police power. As stated in its original form:

"In order to conserve the natural beauty of the Adirondack park by preserving and regulating it for public uses . . . and to abate the public nuisance which has arisen through the unrestricted use of signs and billboards therein, no person shall erect or maintain within the boundaries thereof any advertising sign or billboard, except under written permit from the commission. . . ." (Emphasis ours.)

After various amendments (not relevant herein), in 1969 (L. 1969, c. 1052), the statute was made applicable to the Catskill Park, and in 1970 (L. 1970, c. 392) the statute was further amended to provide for an amortization period of some six and

one-half years for non-complying signs in the Catskill Park (in place of individually determined amortization periods).

It cannot be too strongly emphasized that both the Adirondack and Catskill Parks (the boundaries of which are defined, respectively, in ECL, § 9-0101 [1] and [2]), are uniquely beautiful areas within the State of New York which have long been given special protection.⁵ They consist of an inter-mixture of private and State-owned lands, with the State-owned lands — known as the "forest preserve" — being protected by Article XIV ("Conservation") of the New York State Constitution. Suffice it to say, as found by the Appellate Division of the Supreme Court of the State of New York in its opinion in this case (55 AD2d 340 [1977]) at page 343 (J.S., App. "B", p. 18a):

"The Adirondack and Catskill State Parks are constitutionally protected preserves (N.Y. Const., art. XIV) wherein special material and cultural values exist which are deserving of preservation for future generations. Thus, objects, such as outdoor advertising structures, that offend the eye and detract from the natural beauty of the setting are legitimate targets of legislation requiring their removal providing the totality of the means employed is reasonable . . ."

That a State, as a proper exercise of its police power, may enact laws designed to conserve and protect the beauty and appearance of an area — particularly areas of inestimable value to the public such as the Adirondack and Catskill Parks — is now beyond any shadow of doubt. Almost twenty-five years ago, in the landmark and frequently cited case of *Berman v. Parker*, 348

⁵The Adirondack Park was created in 1892 (L. 1892, c. 707) and the Catskill Park was created in 1904 (L. 1904, c. 233). As to the "special protection" given these areas, see, e.g., *People v. Adirondack Railway Co.*, 160 N.Y. 225 (1899), *aff'd sub nom Adirondack Railway Co. v. New York State*, 176 U.S. 335 (1900); Environmental Conservation Law, § 11-0529 and Public Lands Law, § 17.

U.S. 26 (1954), Mr. Justice Douglas, speaking for a unanimous Court, observed (p. 32):

"We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (see *Block v. Hirsch*, 256 U.S. 135) or the States legislating concerning local affairs. See *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *California State Association v. Maloney*, 341 U.S. 105. * * *"

Mr. Justice Douglas then declared (p. 33):

"The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy spacious as well as clean, well-balanced as well as carefully patrolled. * * *"

Thus, it is unquestionable that the interests sought to be protected by ECL, § 9-0305 — aesthetic enhancement of uniquely beautiful regions of the State of New York through regulation of billboards and outdoor advertising signs — are constitutionally legitimate and proper objects of attainment by the State under its police power.

A.

With regard to the instant appeal, the appellee submits that it is not necessary for this Court to again review whether a statute which regulates the place and manner — *not the content* — of commercial speech, in order to serve an important government interest that is totally unrelated to suppression of free speech, is an impermissible abridgement of freedom of speech, since this Court has firmly and definitively determined that such type of regulation is not unconstitutional.

In *Markham Advertising Co. v. Washington*, 73 Wash. 2d 405, 439 P. 2d 248 (1968), the Supreme Court of Washington, in reviewing a statute strikingly similar to the statute now being challenged, rejected the advertising company's claim that the statute unconstitutionally abridged freedom of speech, and held that the minimal free speech interest affected by the statute was outweighed by the public's right to enjoy highways free of dangerous, obtrusive and unsolicited presence of advertising signs. Moreover, the Court specifically stated (439 P. 2d, at p. 259) "we hold that the maintenance of the natural beauty of areas along interstate highways is to be taken into account in determining whether the police power is properly exercised." This Court then dismissed, for want of a substantial federal question, the appeal taken by the advertising company (393 U.S. 316 [1969]), and also denied its petition for a rehearing (393 U.S. 1112 [1969]).

The law, therefore, is clear that a state legislature need not subordinate all other legitimate public interests to the protection of free speech, nor is it required to totally ignore such other legitimate public interests in order to preserve absolute freedom of speech (see, *Kovacs v. Cooper*, 336 U.S. 77, 88 [1949]). In this regard, it is noted that, in *United States v. O'Brien*, 391 U.S. 367 (1968), this Court declared (p. 377):

" * * * we think it clear that a government regulation is sufficiently justified if it is within the constitutional

power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. * * * " (Emphasis ours.)

Nonetheless, the appellant, in attempting to cloak itself in the mantle of vindicator of First Amendment freedom of speech rights, contends that recent decisions by this Court — which decisions, admittedly, have blurred the distinction between commercial and ordinary speech — require this Court to give plenary consideration to the question of whether the regulation of the place and manner of appellant's billboards accomplished by the subject statute effects an unconstitutional abridgment of appellant's freedom of speech. In support of its request for plenary review, appellant cites *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976), and urges that the tests set forth in that case for a statute to pass constitutional muster have not been satisfied in the case at bar.

In the *Virginia Pharmacy Bd.* case, *supra*, this Court held (425 U.S., at p. 771) that for a statute to permissibly infringe upon freedom of speech, it could not be directed to the content of the regulated speech; it must serve a significant governmental interest; and must leave open ample alternative channels for communication of information.

That the statute in question fully satisfies these tests is easily demonstrated. Initially, it is important to again note that ECL, § 9-0305 does not constitute a prohibition of outdoor advertising signs since it expressly exempts from regulation signs "erected or maintained upon a parcel of real property in connection with the principal business or principal businesses conducted thereon" and any signs located "within the limits of an incorporated village." That the subject statute is not in any way directed to the content of signs or billboards and is self-evident from the words of the statute itself and from the fact that ap-

pellant's claim of unconstitutionality is limited to the two contentions that no significant governmental interest is served by the statute and that the available alternative channels of communication are inadequate.

As to the interest served, there can be no doubt whatsoever — as previously discussed — that the subject statute is a proper exercise of the police power enacted to attain a significantly important governmental interest, which interest clearly outweighs the minimal infringement of speech occasioned by the statute. Thus, appellant's challenge reduces itself solely to the claim that alternative channels of communication are not adequate.

However, the speciousness of this claim — notwithstanding appellant's imaginative attempts to "prove" the "uniqueness" of its billboards as a means of communication — is established by the factual finding of the New York Supreme Court in this case (87 Misc 2d 600, 606 [J.S., App. "C", p. 29a]) that "there are ample other channels of communication available in the affected area such as radio, television and newspapers", and the concurrence with this factual finding by the Appellate Division (55 AD2d 340, 345 [J.S., App. "B", at 20a]) when it noted that "[t]he same information [conveyed by appellant's billboards] can be conveyed to the public by newspaper, radio or television advertising." This factual finding, which was not, and could not be, questioned by the New York Court of Appeals⁶ conclusively refutes appellant's arguments that alternative channels of communication for the supposedly "unique" medium of billboards are inadequate.

Moreover, there are at least two very recent decisions by this Court which further substantiate that the challenged statute does not effect an impermissible abridgment of speech, and these

⁶In cases such as the one at bar, the Constitution of the State of New York, Article VI, § 3 (a), provides that the jurisdiction of the New York Court of Appeals "shall be limited to the review of questions of law."

cases (*Young v. American Mini Theatres*, 427 U.S. 50 [1976] and *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 [1977]) inexorably point to the conclusion that the question herein is not a substantial federal question.

In the *Young* case, *supra*, this Court, although emphasizing its prior holding in *Virginia Pharmacy Bd. v. Virginia Commercial Council, Inc.*, 425 U.S. 748 (1976), *supra*, that commercial speech is entitled to some protection under the First Amendment, nonetheless explicitly stated (427 U.S., at p. 68) that "[a] state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere" and, in support of this statement, cited (see fn. 30, 427 U.S., at p. 68), the case of *Markham Advertising Co. v. Washington*, 73 Wash. 2d 405, 439 P. 2d 248 (1968), appeal dismissed for want of a substantial federal question, 393 U.S. 316 (1969), *supra*.

Similarly, in the *Linmark Associates* case, *supra*, while this Court struck down the township's ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs on lawns because the challenged ordinance was found to be directed at the *content* of the signs — not merely the time, place and manner of speech — this Court suggested (431 U.S., at p. 93) that had Willingboro's ordinance been genuinely concerned with the place or manner of speech, or even "prohibited all lawn signs — or all lawn signs of a particular size or shape — *in order to promote aesthetic values*" (emphasis ours), the ordinance could have survived constitutional scrutiny. Further, in making this observation, this Court, in a footnote (see fn. 7, 431 U.S., at p. 94), cited, with apparent approval, the *Markham Advertising Co.* case, *supra*.

Clearly, the freedom of speech issue in the case at bar is so foreclosed by recent decisions of this Court as to leave no room for real controversy and, therefore, cannot be deemed to present a substantial federal question warranting plenary consideration by this Court.

B.

Appellant's claim that the subject statute effects a deprivation of property (i.e., a "taking") without due process of law in violation of the Fourteenth Amendment, is also without merit. This claim is bottomed on the argument that an amortization period — no matter how lengthy the period may be — can never be a constitutionally adequate equivalent for compensation. Surely, in the face of existing precedents, such argument is patently frivolous.

As with the freedom of speech issue, the case of *Markham Advertising Co. v. State of Washington*, 73 Wash. 2d 405, 439 P. 2d 248 (1968), *supra*, points to the conclusion that the "taking" issued does not present a substantial federal question warranting plenary review by this Court. In *Markham*, the challenged statute provided for a maximum amortization period of some four years, and the Washington Supreme Court held that both the concept of amortization in lieu of compensation and the length of the amortization period provided were constitutional. As previously noted, this Court dismissed the appeal taken by Markham for want of a substantial federal question (393 U.S. 316 [1969]), and also denied the petition for a rehearing (393 U.S. 1112 [1969]).

Similarly, in *Art Neon Co. v. City and County of Denver*, 488 F. 2d 118 (10th Cir., 1973), the Tenth Circuit upheld the constitutionality of amortization periods of two to five years for the termination of signs made non-conforming by the subject ordinance, and this Court then denied a petition for certiorari. 417 U.S. 932 (1974).

Finally, in *National Advertising Co. v. County of Monterey*, 464 P. 2d 33 (1970), the ordinance provided that billboards in "U" (unclassified) districts were to be removed within one year after the property on which a sign was located was reclassified into some other district. The Supreme Court of California declared that this one-year amortization period was constitutional with

respect to signs which had already been fully amortized, and that other signs should be removed after the "expiration of a reasonable amortization period in order to permit plaintiff to recover their original cost" (464 P.2d, at p. 36). Certiorari was thereafter denied by this Court. 398 U.S. 946 (1970).

As to the case at bar, it is important to note that ECL, § 9-0305, on its face, provides for an amortization period of some 6-1/2 years — significantly longer than the periods in the above-discussed cases. Moreover, the Court of Appeals, in construing this statute, not only upheld the 6-1/2 year amortization period as being a constitutionally adequate and permissible alternative to compensation but, additionally, directed (43 NY2d at p. 481 [J.S., App. "A", p. 12a]) that the case be remanded for a hearing "to provide plaintiff with an opportunity to establish, if it can, that the statutory amortization period of six and one-half years is unreasonable, as applied." Cf. *National Advertising Co. v. County of Monterey*, *supra*.

Surely, under the circumstances herein, appellant's claim of deprivation of property without due process of law does not present a substantial federal question and, indeed, is specious.

CONCLUSION

This Court should dismiss the appeal on the ground that there has not been a final judgment or, in the alternative, that no substantial federal questions are presented.

Dated: July 6, 1978

Respectfully submitted,

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Supreme Court of the United States
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ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF IN OPPOSITION
TO MOTION TO DISMISS**

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IN THE
Supreme Court of the United States

October Term 1978

No. 77-1671

MODJESKA SIGN STUDIOS, INC.,
Appellant,

v.

PETER A. A. BERLE,
Appellee.

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OF THE STATE OF NEW YORK

**BRIEF IN OPPOSITION
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The State in its motion to dismiss questions the finality of the judgment and asserts that the questions presented are not substantial. We reply below.

**I. THE JUDGMENT BELOW IS FINAL WITHIN
THE MEANING OF 28 U.S.C. § 1257.**

The Court of Appeals held that the New York statute requiring the removal of appellant Modjeska's signs from Catskill Park did not abridge Modjeska's freedom of speech in violation of the First and Fourteenth Amendments and that the signs could be removed without the payment of the just compensation that the Fifth and Fourteenth Amendments require be paid when private property

is taken for public use. The court's judgment is plainly final on those two issues. However, the court remanded the case for trial of a separate issue, albeit an issue related to its holding that the signboards could be removed without recourse to the power of eminent domain and the payment of just compensation.

Thus, the judgment of the Court of Appeals is not a textbook "final judgment." But that fact does not prevent it from being a final judgment within the meaning of the statute, 28 U.S.C. § 1257(2), authorizing this Court to review on appeal certain "final judgments or decrees" of the highest court of a state in which a decision could be had. *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975).

In the *Cox Broadcasting* case the Court listed four categories of cases in which it has treated a state court determination of a federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 even though "there are further proceedings in the lower state courts to come." *Id.* at 477. This case plainly fits in one or both of two of the listed categories.

The Court of Appeals' remand to the trial court was for the purpose of determining whether, according to standards that the court laid out, the six-and-one-half-year period between the enactment of the statute and the deadline for removal of Modjeska's signs was a reasonable period. (Jur. St. 7a-12a.) The court held that the billboards could be removed in the exercise of the police power, without monetary compensation, but that because the only state interest asserted was a rather attenuated, non-compelling interest in aesthetics, a reasonable grace period, or period of "amortization," must be allowed. (*Id.* at 7a-8a.) The court added that, "[w]hile an owner need not be given that period of time necessary to permit him to recoup his investment entirely . . . , the amortization period should

not be so short as to result in a substantial loss of his investment." (*Id.* at 10a-11a.)

Thus, this case fits within the second category of cases described in *Cox Broadcasting*, "cases such as *Radio Station WOW, [Inc. v. Johnson]*, 326 U.S. 120 (1945), and *Brady v. Maryland*, 373 U.S. 83 (1963), in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. Certainly the First Amendment question will survive and require decision regardless of the outcome of the "reasonableness" trial. And the taking question will also survive — because by the highest state court's decision the "amortization" period is not and, to be reasonable, need not be the equivalent of just compensation.*

From a slightly different perspective, the case also fits within the fourth category in the *Cox Broadcasting* scheme. The fourth category consists of cases in which a federal issue has been finally decided, with further proceedings in which the appellant or petitioner might prevail on non-federal grounds but where reversal on the federal issue already decided would preclude the further litigation. In such cases "if a refusal immediately to review the state-

*Because the determination of the "reasonableness" of the grace period is not a determination of the justness of compensation but instead is made because it has been decided that just compensation need not be paid, this case is not the classical eminent domain case dealt with in footnote 6 of the *Cox Broadcasting* opinion (Motion 9). In such a case, to be sure, "a state judgment is not final unless it covers both aspects of that integral problem," the problem of taking and just compensation. *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 477 n. 6 (1975), quoting *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973). Here "both aspects" of the "integral" eminent domain problem have been determined. The state court has ruled that there is no taking and therefore just compensation need not be paid.

court decision might seriously erode federal policy, the Court has entertained and decided the federal issue" 420 U.S. at 482-83. Reversal on either the First Amendment issue or the taking issue in this case would clearly preclude any further litigation as to the reasonableness of the grace period. And at least as to the free speech issue, deferral of review "might seriously erode federal policy" embodied in the First Amendment. It would do so by maintaining the atmosphere of uncertainty of the extent of constitutional protection of one of our important media of communication that has nurtured the New York statute in this case, other farther-reaching statutes and ordinances and the litigation represented by this case, its companion, *Suffolk Outdoor Advertising Co. v. Hulse*, No. 77-1670, and related cases elsewhere in the country. Cf. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), discussed in *Cox Broadcasting*, 420 U.S. at 484-85.

II. THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

On the First Amendment question, the State, like the Town of Southampton in the companion case, No. 77-1670, argues that *Markham Adv. Co. v. Washington*, 73 Wash. 2d 407, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969), is controlling and that New York's statute, like the Southampton ordinance, is a valid "time, place or manner" restriction of commercial speech. We adopt here the brief in opposition in No. 77-1670, copies of which are being served on counsel for the appellee in this case.

There are some fillips to the State's argument that merit separate response.

First, the State attempts to impart to the statement of the courts below that other means of communication are available to persons who would advertise their wares and services in the commercial areas of Catskill Park the dignity

of factual findings. (Motion 15.) They are not findings entitled to any deference. The case was decided on motions without any facts being found. The facts as to the inadequacy or non-existence of other channels of communication are those mentioned in the jurisdictional statement (Jur. St. 11-12), which could have been proved under the allegations of Modjeska's complaint and which must be taken as established.

Second, the State attempts to distort this Court's apparent reservation in *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 & n.7 (1977), of the question of the constitutionality of a prohibition of all signs regardless of content into a suggestion by the Court that such a prohibition would be valid. (Motion 16.) The Court knows whether it meant to reserve a question or suggest an answer, but when the Court's last pronouncement on an issue is at most a mere suggestion, we submit that it cannot fairly be said that "the question is foreclosed by our decisions or that it is so clearly not debatable as to require dismissal for lack of substance." *Chesebro v. Los Angeles County Flood Control Dist.*, 306 U.S. 459, 463 (1939).

So far as the taking issue is concerned, it is true, as the State says (Motion 17-18), that in *Markham* the statute provided for a so-called amortization period, as does New York's statute, and so did ordinances involved in cases in which this Court has denied certiorari. None of those cases involved so sweeping and wholesale an eviction of billboards from an area as does the Catskill Park statute. In any event, those cases do not establish that an amortization period is "a constitutionally adequate and permissible alternative to compensation" (Motion 18) if there has been a taking. Just compensation is nothing less than "a full and perfect equivalent for the property taken," *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893), or "the full monetary equivalent of the property taken," *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United*

States v. General Motors Corp., 323 U.S. 373, 379 (1945).
The question whether, when billboards are ordered removed from an entire geographical area, there has been a taking and compensation of that sort must be paid is a question that deserves the plenary consideration of this Court.

Respectfully submitted,

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